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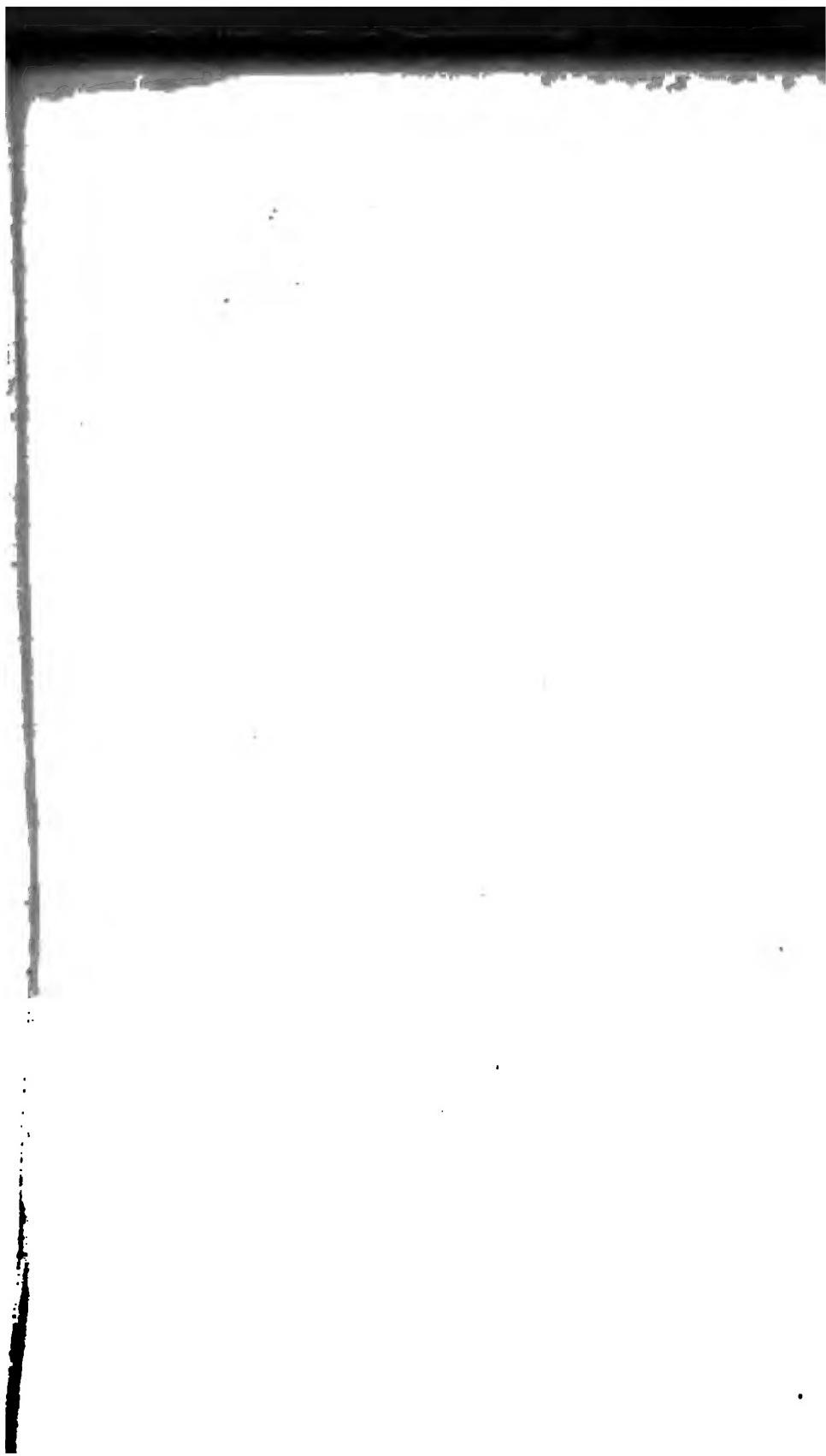
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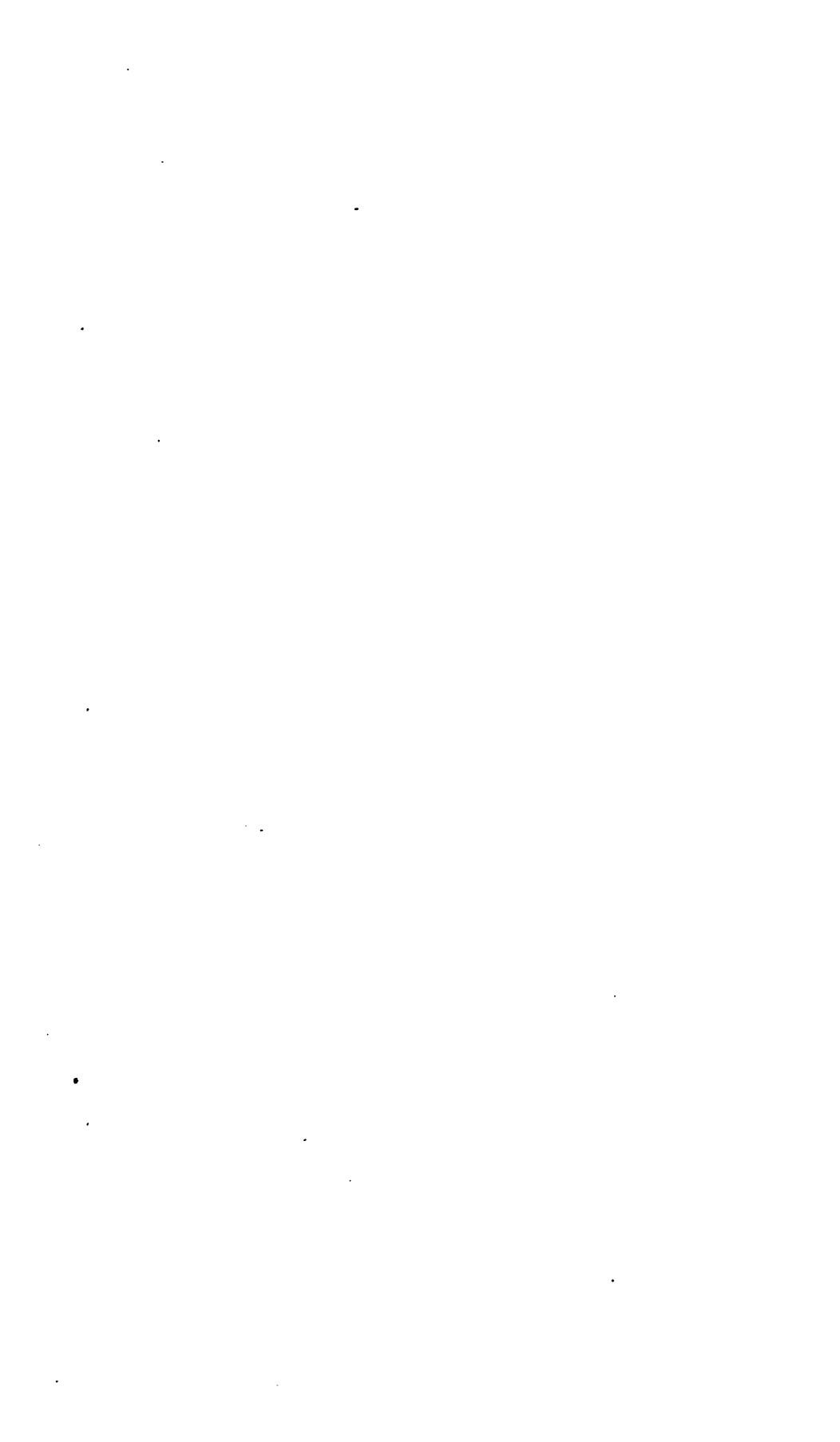
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QUEEN'S BENCH

REPORTS.

BY
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AND
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NEW SERIES.

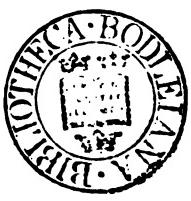
VOL. XVIII.

CONTAINING THE CASES DETERMINED IN
HILARY VACATION, EASTER TERM AND TRINITY TERM, 1852.
XV. VICTORIA.

WITH TABLES OF THE NAMES OF THE CASES ARGUED AND CITED,
AND THE PRINCIPAL MATTERS.

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T A B L E

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THE NAMES OF CASES

REPORTED IN THIS VOLUME.

A.	Page		Page
Allan v. Lake	560	Bluck v. Bateman	870
Amott v. Holden	593	Bostock v. North Staffordshire Railway Company	777
Anglo-Californian Gold Mining Company v. Stewart	736	— v. Sidebottom	813
— v. Wilkinson	728	—, Sidebottom v.	829
Arnold, Regina v.	553	Bradley, Newcastle-upon-Tyne, Master Pilots, &c., of (2 <i>E. & B.</i> 428, note (a))	144
Ashton-under Lyne, Mayor, &c., of, Slater v.	398	British Guarantee Association, Walker v.	277
Avery, Regina v.	576	Bromley, Bear v.	271
		Broughton v. Jackson	378
B.			
Barber, Howes v.	588		C.
Barnes v. Marshall	785		
Bastow v. Gant (12 <i>Q. B.</i> 807, note)	553	Caudwell, Regina v. (17 <i>Q. B.</i> 504, note (c))	270
Bateman v. Bluck	870	Castelli v. Groom	490
Bean, Renshaw v.	112	Challis, Doe dem. Evers et al. Ux. v.	224
Bear v. Bromley	271	— v. — in Error	231
Birkenhead Dock, Trustees of, v. Birkenhead Overseers of (2 <i>E. & B.</i> 148)	702	Chatfield v. Cox	321
Bishop v. Curtis	878	Clue, Martyn v.	661
Blake v. Midland Railway Company	93	Cooke, Ostler v. In Error	831
		Cox, Chatfield v.	321
		Crake v. Powell (2 <i>E. & B.</i> 210)	133

TABLE OF CASES REPORTED.

	Page		Page
Cremer, Goodwin <i>v.</i>	757	Gardner, Crosthwaite <i>v.</i>	640
Crofts, Stapleton <i>v.</i>	367	Gibbins, Timmins <i>v.</i>	722
Crosthwaite <i>v.</i> Gardner	640	Gittins, Meredith <i>v.</i>	257
Curtis, Bishop <i>v.</i>	878	Goodwin <i>v.</i> Cremer	757
D.		Grafton, Doe dem. King <i>v.</i>	496
Death, Ex parte	647	Great Western Railway Com- pany, Regina <i>v.</i> (15 Q. B. 1085)	144
Denton, Inhabitants of, Re- gina <i>v.</i>	761	Groom, Castelli <i>v.</i>	490
Doe dem. Evers et Ux. <i>v.</i>		H.	
Challis	224	Hallett <i>v.</i> Dowdall	2
——— Challis <i>v.</i> In error	231	Heseltine <i>v.</i> Seeley	443
——— King <i>v.</i> Grafton	496	Hill, Lane <i>v.</i>	252
——— Hudson <i>v.</i> Roe	806	Hillingdon, Vicar, &c., of, Regina <i>v.</i>	718
——— Evers <i>v.</i> Ward	197	Hodsman, Shepherd <i>v.</i>	316
Dover and Deal Railway Company, Macgregor <i>v.</i>	618	Holden, Amott <i>v.</i>	593
Dowdall, Hallett <i>v.</i>	2	Hollands, Neve <i>v.</i>	262
E.		Howes <i>v.</i> Barber	588
East London Waterworks, Proprietors of, Regina <i>v.</i>	705	Hull Dock Company, Re- gina <i>v.</i>	325
Eden, Wilson <i>v.</i>	474	Husthwaite, Inhabitants of, Regina <i>v.</i>	447
Ex parte Death	647	J.	
——— Napier	692	Jackson, Broughton <i>v.</i>	378
——— Phillips (2 E. & B. 192)	890	K.	
——— Ramshay	173	Kennet and Avon Canal Navigation Company <i>v.</i>	
——— Rose, D. D.	751	Witherington	531
F.		Kernot <i>v.</i> Pittis (2 E. & B. 406)	890
Farrow <i>v.</i> Mayes	516	L.	
Fletcher, Regina <i>v.</i> (2 E. & B. 279)	502	Lake, Allan <i>v.</i>	560
Francis, Regina <i>v.</i>	526	Lancashire, Justices of, Re- gina <i>v.</i>	361
G.		Lane <i>v.</i> Hill	252
Gage <i>v.</i> Newmarket Railway Company	457		
Gant, Bastow <i>v.</i> (13 Q. B. 807, note)	553		

TABLE OF CASES REPORTED.

	Page		Page
Regina v. Leeds and Bradford Railway Company	343	Sieley, Heseltine v.	443
——— v. Leggatt	781	Sill, Regina v. (1 E. & B. 553 note (a))	756
——— v. London, Justices of note (c)	421	Slater v. Ashton-under-Lyne, Mayor &c. of	398
——— v. Longwood, Churchwardens and Overseers of (17 Q. B. 871)	890	Slawstone, Inhabitants of, Regina v.	388
——— v. Middlesex, Treasurer	553	Sligo and Shannon Railway Company, Mackenzie v.	862
——— v. Salford, Overseers of	687	Smith v. Thorne	134
——— v. Savile	703	Southampton, Inhabitants of, Regina v.	841
——— v. Scaife	773	Stamford, Earl of, Lowndes v.	425
——— v. Sill (1 E. & B. 553, note (a))	756	Stapleton v. Crofts	367
——— v. Slawstone, Inhabitants of	388	Stewart v. Anglo-Californian Gold Mining Company	736
——— v. Southampton, Inhabitants of	841	Street, Regina v.	682
——— v. Street	682	Suffolk, Justices of, Regina v.	416
——— v. Suffolk, Justices of	416		T.
——— v. Tithe Commissioners of England and Wales, Re Hale Tithes	156	Tallis v. Tallis (1 E. & B. 397 note (a))	415
——— v. Williams	393	Taylor, Tetley v. (1 E. & B. 521. 532)	813
Regina v. Wilson, Sir T. M., Bart.	348	Tetley v. Taylor (1 E. & B. 521. 532)	813
Regula Generalis	251	Thellusson, Mardall v.	857
Renshaw v. Bean	112	Thorne, Smith v.	134
Rochdale Canal Company v. Radcliffe	287	Timmins v. Gibbins	722
Roe, Doe dem. Hudson v.	806	Tithe Commissioners of England and Wales, Re Hale Tithes, Regina v.	156
Rose, D.D. Ex parte	751		W.
	S.	Walker v. British Guarantee Association	277
Salford, Overseers of, Regina v.	687	Ward, Doe dem. Evers v.	197
Savile, Regina v.	703	Wilkinson v. Anglo-Californian Gold Mining Company	728
Scaife, Regina v.	773	Williams, Regina v.	393
Shepherd v. Hodzman	316	Wilson v. Eden	474
——— v. Londonderry, Marquis of	145	——— Sir T. M. Bart., Regina v.	348
Shinner, Palk v.	568	Witherington, Kennet and Avon Canal Navigation Company v.	531
Sidebottom, Bostock v.	813		
——— v. Bostock	829		

TABLE OF CASES CITED.

A.

			Page
Addis <i>v.</i> Clement	-	2 P. Wms. 456	- 482
Addison <i>v.</i> Gibson	-	10 Q. B. 106	- 601
Albon <i>v.</i> Pyke	-	4 Man. & G. 421	- 887
Alchorne <i>v.</i> Saville	-	6 B. Moore, 202, note (a)	- 30
Allam <i>v.</i> Gomme	-	11 A. & E. 759. 770	- 300
Andrews <i>v.</i> Ellison	-	6 B. Moore, 199	- 30
Angerstein <i>v.</i> Handson	-	{ 1 Cro. M. & R. 789. S. C. Tyr. 383 - - -	- 673
Annesley <i>v.</i> Earl of Anglesey	-	17 How. St. Tr. 1139. 1276	- 367
Anthony <i>v.</i> Seger	-	1 Hagg. Consist. C. C. 9. 13	- 720
Appleton <i>v.</i> Binks	-	5 East, 148	- 506
Arkell <i>v.</i> Fletcher	-	10 Sim. 299	- 483
Armworth <i>v.</i> South Eastern Railway Company	{	11 Jurist, 758	- 104
Arnold <i>v.</i> Poole, Mayor of	-	4 M. & G. 860	527. 636
Ashburnham <i>v.</i> Bradshaw	-	2 Ath. 36	- 344
Ashpitel <i>v.</i> Sercombe	-	5 Exch. 147	- 744
Asplin <i>v.</i> Blackman	-	7 Exch. 386	- 259
Aykroyd, In re	-	1 Exch. 479	- 787

B.

Bailey <i>v.</i> Haines	-	15 Q. B. 533	- 760
Bain <i>v.</i> Whitehaven and Furness Junction Railway Company	{	3 Ho. Lord's Ca. 1	- 41
Ballard <i>v.</i> Way	-	{ 1 M. & W. 520. 529. S. C. Tyr. & G. 851. 862	- 538
Bank of England, Governor and Company of, <i>v.</i> Newman	{	1 Ld. Raym. 442	- 724
Banwen Iron Company <i>v.</i> Barnett	-	8 Com. B. 406	- 742
Barbat <i>v.</i> Allen	-	7 Exch. 609	- 368
Barber Ex parte	-	1 Macn. & G. 176	- 867
— <i>v.</i> Dixie	-	Ca. K. B. Hard. 264	- 369
Barrett <i>v.</i> Birmingham	-	{ 1 Flan. & K. (Rolls, Ireland), 556 - - -	- 140
Baxter <i>v.</i> Nichols	-	4 Taunt. 90	- 612
Beasley <i>v.</i> Clarke	-	2 New Ca. 705	- 573
Beaumont <i>v.</i> Greathead	-	2 Com. B. 494	- 75
— <i>v.</i> Meredith	-	3 Ves. & B. 180	- 27

TABLE OF CASES CITED.

			Page
Beck <i>v.</i> Beverley	-	11 <i>M. & W.</i> 845	- 445
Beckwith <i>v.</i> Philby	-	6 <i>B. & C.</i> 635	- 382
Bell <i>v.</i> Nixon	-	9 <i>Bing.</i> 393	- 318
Beman <i>v.</i> Rufford	-	1 <i>Sim. N. S.</i> 550	- 625
Bentley <i>v.</i> Cook	-	3 <i>Doug.</i> 422	- 374
— Ex parte	-	2 <i>Deac. & Ch.</i> 578	- 508
Berry <i>v.</i> Pratt	-	1 <i>B. & C.</i> 276	- 591
Beverley <i>v.</i> Lincoln Gas Light and Coke Company	{ -	6 <i>A. & E.</i> 829	- 633
Biffin <i>v.</i> Yorke	-	5 <i>M. & G.</i> 428	- 523
Bird <i>v.</i> Gammon	-	3 <i>New Ca.</i> 883	- 139
Bishop <i>v.</i> Helps	-	2 <i>Com. B.</i> 45	- 390
— <i>v.</i> North	-	11 <i>M. & W.</i> 418	824. 830
Black <i>v.</i> Caddell	-	Dict. <i>Decis.</i> , Vol. 31 & 32, p. 13905	- 100
Blair <i>v.</i> Ormond	-	17 <i>Q. B.</i> 423	- 600
Blakesley <i>v.</i> Smallwood	-	8 <i>Q. B.</i> 538	- 859
Blanchard <i>v.</i> Bridges	-	4 <i>A. & E.</i> 176	- 119
Bland <i>v.</i> Crowley	-	6 <i>Exch.</i> 522	- 464
— <i>v.</i> Williams	-	2 <i>Myl. & K.</i> 411	- 237
Bonaker <i>v.</i> Evans	-	16 <i>Q. B.</i> 162	- 188
Bostock <i>v.</i> North Staffordshire Railway Company	{ -	4 <i>E. & B.</i> 798	- 632
Boulton <i>v.</i> Crowther	-	2 <i>B. & C.</i> 703	- 537
Bower <i>v.</i> Hill	-	2 <i>New Ca.</i> 339	- 299
Bridgman <i>v.</i> Holt	-	Show. <i>Parl. Ca.</i> 111. <i>Skinn.</i> 354. 425	- 824
Bright <i>v.</i> Walker	-	{ 1 <i>C. M. & R.</i> 211. <i>S. C. 4 Tyr.</i> 502	- 571
Broughton <i>v.</i> Harpur	-	2 <i>Ld. Raym.</i> 752	- 375
Brown <i>v.</i> Burtenshaw	-	7 <i>Dowl. & R.</i> 603	- 499
— <i>v.</i> Clarke	-	12 <i>M. & W.</i> 25	- 779
— <i>v.</i> Macgregor	-	{ Fac. <i>Collect. Feb. 26, 1813,</i> p. 232, 233	- 100
Browne <i>v.</i> Lee	-	6 <i>B. & C.</i> 689	- 612
Bruerton's Case	-	6 <i>Rep. 1 a</i>	- 125
Bryan <i>v.</i> Child	-	5 <i>Exch.</i> 368	- 521
Buckeridge <i>v.</i> Flight	-	6 <i>B. & C.</i> 49	- 538
Buckley <i>v.</i> Hann	-	5 <i>Exch.</i> 43	- 787
Budd <i>v.</i> Fairmaner	-	8 <i>Bing.</i> 48	- 563
Bull <i>v.</i> Pritchard	-	1 <i>Russ.</i> 313. 5 <i>Hare.</i> 567	- 237
Bullock <i>v.</i> Dodds	-	2 <i>B. & Ald.</i> 258	- 881
Burleigh <i>v.</i> Stott	-	6 <i>B. & C.</i> 36	- 265
Burrell <i>v.</i> Jones	-	3 <i>B. & Ald.</i> 47	- 506
Bussey <i>v.</i> Barnett	-	9 <i>M. & W.</i> 312	- 726
Butler and Masters, Re	-	13 <i>Q. B.</i> 341	- 792
C.			
Caldwell <i>v.</i> Becke	-	2 <i>Exch.</i> 318	- 601
Callow <i>v.</i> Lawrence	-	3 <i>M. & S.</i> 95	- 758
Camidge <i>v.</i> Allenby	-	6 <i>B. & C.</i> 373	- 723
Campbell <i>v.</i> Maund	-	5 <i>A. & E.</i> 865	- 719
Cane <i>v.</i> Chapman	-	5 <i>A. & E.</i> 647	- 537
Carden <i>v.</i> General Cemetery Company	-	5 <i>New Ca.</i> 253	- 35
Carlen <i>v.</i> Drury	-	1 <i>Ves. & B.</i> 154. 157	- 51
Carpue <i>v.</i> London and Brighton Railway Company	{ -	5 <i>Q. B.</i> 747	- 104

TABLE OF CASES CITED.

xi

				Page
Carr v. Foster	-	3 Q. B. 581	-	129
Carruthers v. Graham	-	9 Dowl. P. C. 947	-	493
Carwardine v. Carwardine		{ Fearn. Cont. Rem. 388. S. C. Eden's Ch. Ca. 27		240
Chandelor v. Lopus	-	Cro. Jac. 4	-	563
Chandler v. Thompson	-	3 Camp. 80	-	120
Chelsea Waterworks Company v. Bowley	17 Q. B. 358	-	-	712
Cherrington v. Abney	-	2 Vern. 646	-	123
Children of Forrest v. Clerkington	-	{ Dict. Decis. Vol. 31. & 32. p. 13903	-	100
Church v. Imperial Gas Light and Coke Company	-	{ 6 A. & E. 856	-	627. 634
Churchill v. Bertrand	-	3 Q. B. 568	-	644
Clayton v. Kynaston	-	2 Salk. 573	-	436
Clements v. Todd	-	1 Exch. 268	-	747
Cochrane, in re	-	8 Dowl. P. C. 630	-	782
Cole v. Sewell	-	{ 2 H. L. Ca. 186. 4 Drury & Warren, 1	-	232
Colman v. Eastern Counties Railway	-	10 Bear. 114	-	624
Cotterell v. Griffiths	-	4 Esp. N. P. C. 69	-	120
Couch v. Steel	-	3 E. & B. 402	-	886
Cowper v. Godmond	-	9 Bing. 748	-	644
Crake v. Powell	-	2 E. & B. 210	-	269
Crease v. Sawle	-	2 Q. B. 862. 886	-	714
Crisp v. Bunbury	-	8 Bing. 394	-	886
Crosby Tithes, Re	-	13 Q. B. 761	-	150
Croughton v. Blake	-	12 M. & W. 205	-	165
Crump dem. Woolley v. Norwood	-	7 Taunt. 362	-	234
D.				
Dabbs v. Humphries	-	10 Bing. 446	-	139
Dand v. Kingscote	-	6 M. & W. 174	-	823. 830
Daniel v. North	-	11 East. 375	-	873
Davis v. Dinwoody	-	4 T. R. 678	-	375
— v. Gibbs	-	3 P. Wms. 26	-	484
— v. Russell	-	5 Bing. 354	-	382
Dawson v. Wrench	-	3 Exch. 359	-	11
Day v. Trig	-	1 P. Wms. 286	-	482
Diggle v. London and Blackwall Railway Company	-	{ 5 Exch. 442. 450	-	528
Dimes v. Pettley	-	15 Q. B. 276	-	874
Dobson v. Groves	-	6 Q. B. 637	-	424
Dodgson v. Scott	-	2 Exch. 457	-	792
Dodson v. Mackey	-	8 A. & E. 225	-	140
Doe dem. Pitcher v. Donovan	-	1 Taunt. 555. S. C. 2 Camp. 78	497	
— Blakiston v. Haslewood	-	10 Com. B. 544	-	242
— Harris v. Howell	-	10 B. & C. 191. 200	-	249
— Holcomb v. Johnson	-	6 Esp. N. P. C. 10	-	500
— Cornwall v. Matthews	-	11 Com. B. 675	-	499
— Strode v. Seaton	-	{ 2 Cro. M. & R. 726. 730. S. C. Tyr. & G. 19	-	672
— Herbert v. Selby	-	2 B. & C. 926. 930	-	228
— Wadmore v. Selwyn	-	Adams on Ejectment, 107, 4th ed.	500	
— Savage v. Stapleton	-	3 Carr. & P. 275	-	500
— Norris v. Tucker	-	3 B. & Ad. 473	-	217
— Dolley v. Ward	-	9 A. & E. 582	216. 227. 337	
Dougal v. Wilson	-	2 Wms. Saund. 175 a. 6th ed.	-	120

TABLE OF CASES CITED.

			Page
Dowdell <i>v.</i> Australian Royal Mail Company	-	{ 3 <i>E. & B.</i> 902	- 592
Downman <i>v.</i> Williams	-	7 <i>Q. B.</i> 103	- 506
Drewell <i>v.</i> Towler	-	3 <i>B. & Ad.</i> 735	- 297
Duckett <i>v.</i> Williams	-	1 <i>Cro. & J.</i> 510. <i>S. C. 1 Tyr.</i> 502	495
Duffield <i>v.</i> Duffield	-	3 <i>Bligh. N. S.</i> 260	- 218
Duncan <i>v.</i> Findlater	-	6 <i>Cl. & Fin.</i> 894	- 100
Dunlop <i>v.</i> Higgins	-	1 <i>H. Lords' Ca.</i> 281	- 391
Dye <i>v.</i> Bennett	-	9 <i>Com. B.</i> 281	- 494
Dyke <i>v.</i> Walford	-	3 <i>Moore's Pr. C. Ca.</i> 434	- 420
E.			
East Anglian Railways Company <i>v.</i> Eastern Counties Railway Company	-	{ 11 <i>Com. B.</i> 775	467. 623
East London Waterworks Company <i>v.</i> Trustees for Mile End Old Town	-	{ 17 <i>Q. B.</i> 512	- 712
Edge <i>v.</i> Pemberton	-	12 <i>M. & W.</i> 187	- 564
Edis <i>v.</i> Bury	-	6 <i>B. & C.</i> 433	- 472
Edmundson, Re	-	17 <i>Q. B.</i> 67	- 343
Eidsforth <i>v.</i> Farrer	-	4 <i>Com. B.</i> 9. 15	- 583
Edwards <i>v.</i> Cameron's Coalbrook &c. Railway Company	-	{ 6 <i>Exch.</i> 269	- 805
——— <i>v.</i> Sherren	-	11 <i>M. & W.</i> 595	- 867
Eicke <i>v.</i> Nokes	-	1 <i>Moo. & Rob.</i> 359	- 138
Elkington <i>v.</i> Holland	-	9 <i>M. & W.</i> 659	- 795
Elliott <i>v.</i> South Devon Railway Company	2	<i>Exch.</i> 725	- 106
Evans, Ex parte	-	3 <i>Deac. & Ch.</i> 470	- 508
Everard <i>v.</i> Poppleton	-	5 <i>Q. B.</i> 181	- 792
F.			
Falmouth, Earl of, <i>v.</i> Thomas	-	1 <i>Cro. & M.</i> 89. <i>S. C. 3 Tyr.</i> 26	673
Fawcett <i>v.</i> York and North Midland Railway Company	-	{ 16 <i>Q. B.</i> 610. 614 note (a)	354
Festing <i>v.</i> Allen	-	12 <i>M. & W.</i> 279	- 240
Finch, Sir Moyle, Case of	-	6 <i>Rep.</i> 63 a. 65 b.	- 580
Finlay <i>v.</i> Bristol and Exeter Railway Company	-	{ 7 <i>Exch.</i> 409. 415	- 634
Flight <i>v.</i> Buckeridge	-	3 <i>Bing.</i> 215	- 538
Foley <i>v.</i> Addenbrooke	-	4 <i>Q. B.</i> 197	- 679
Forrest, Children of, <i>v.</i> Clerkington	-	<i>Dict. Decis. Vol. 31 & 32.</i> 13903	100
Fox <i>v.</i> Clifton	-	6 <i>Bing.</i> 766	- 41
Frankum <i>v.</i> Earl of Falmouth	-	2 <i>A. & E.</i> 452	- 132
Free <i>v.</i> Burgoyne	-	{ 5 <i>B. & C.</i> 400. <i>S. C. Bligh.</i> N. S. 65	- 809
Fuller, Re	-	2 <i>E. & B.</i> 573	- 789
Furnivall <i>v.</i> Coombes	-	5 <i>Man. & G.</i> 736	- 36
G.			
Galvanized Iron Company <i>v.</i> Westoby	-	8 <i>Exch.</i> 17	- 736
Gardiner <i>v.</i> Gray	-	4 <i>Camp.</i> 144	- 564
Gardner <i>v.</i> McMahon	-	3 <i>Q. B.</i> 561	- 140
Garritt <i>v.</i> Sharp	-	3 <i>A. & E.</i> 325	- 121
Gay <i>v.</i> Hall	-	5 <i>Dowl. & L.</i> 422	- 794

TABLE OF CASES CITED.

			Page
Highmore v. Primrose	-	5 <i>M. & S.</i> 65	- 254
Hilton v. Earl Granville	-	5 <i>Q. B.</i> 701, 710	- 671
Hitchcock v. Way	-	6 <i>A. & E.</i> 943	769. 867
Hodgson v. Field	-	7 <i>East.</i> , 613	- 824
Holland's Case	-	4 <i>Rep.</i> 75 a, 76 a, b	- 538
Holt v. Kershaw	-	5 <i>Dowl. & L.</i> 419	- 793
Homersham v. Wolverhampton Water- works Company	{	6 <i>Exch.</i> 137	- 637
Howden, Lord, v. Simpson	-	10 <i>A. & E.</i> 703	- 463
Huggins v. Coates	-	5 <i>Q. B.</i> 432	- 644
Humphreys v. Jones	-	14 <i>M. & W.</i> 1	- 140
Hurst v. Parker	-	1 <i>B. & Ald.</i> 92	- 138
Hutchinson v. Sturges	-	<i>Willes.</i> , 264	- 860
Hyde v. Scyssor	-	<i>Cro. Jac.</i> 538	- 101
J.			
James v. Swift	-	4 <i>B. & C.</i> 681	- 579
Jee v. Audley	-	1 <i>Cox Cu. Ch.</i> 324	- 236
Jenkins v. Hutchinson	-	13 <i>Q. B.</i> 744	42. 507
Johnson v. Compton	-	4 <i>Sim.</i> 37	- 608
Jones v. Broadhurst	-	9 <i>Com. B.</i> 173	- 758
— v. Downman	-	4 <i>Q. B.</i> 235, note (a)	- 506
— v. Fitzaddams	-	2 <i>Dowl. P. C.</i> 111	- 774
— v. Harrison	-	6 <i>Exch.</i> 328	- 258
— v. Westcomb	-	1 <i>Eq. Ca. Ab.</i> 245	- 231
K.			
Kay v. Goodwin	-	6 <i>Bing.</i> 576	- 768
Keightley v. Watson	-	3 <i>Exch.</i> 716	- 679
Kemp v. Derrett	-	3 <i>B. & C.</i> 88	- 498
— v. Hyslop	-	1 <i>M. & W.</i> 58. <i>S. C. Tyr. & G.</i> 77	808
Kennedy v. Gouveia	-	8 <i>Dowl. & R.</i> 503	- 508
Kennett v. Milbank	-	8 <i>Bing.</i> 38	- 140
Kill v. Hollister	-	1 <i>Wils.</i> 129	- 432
Kinnersley v. Knott	-	7 <i>Com. B.</i> 980	- 580
Kinning, Ex parte	-	4 <i>Com. B.</i> 507	- 188
Kirton v. Wood	-	1 <i>M. & Rob.</i> 258	- 25
Knight v. Woore	-	3 <i>New Ca. 3</i>	- 303
L.			
Lamprell v. Billericay Union	-	3 <i>Exch.</i> 283	- 637
Lancaster Canal Company v. Parnaby	-	11 <i>A. & E.</i> 223, 242	- 306
Lander v. Gordon	-	7 <i>M. & W.</i> 218	- 774
Lane v. Earl Stanhope	-	6 <i>T. R.</i> 345	- 482
Leake v. Robinson	-	2 <i>Meriv.</i> 363	- 236
Lee v. Nixon	-	1 <i>A. & E.</i> 201	- 318
Legh v. Hewitt	-	4 <i>East.</i> , 154	- 674
Lennard v. Robinson	-	6 <i>E. & B.</i> 125	- 516
Levy v. Hamer	-	5 <i>Exch.</i> 518	- 808
Lewis v. Holmes	-	10 <i>Q. B.</i> 896	- 808
— v. Lord Kensington	-	2 <i>Com. B.</i> 463	- 793
Lichfield, Mayor of, v. Simpson	-	8 <i>Q. B.</i> 65	- 887
Lister v. Lobley	-	7 <i>A. & E.</i> 124	- 547

TABLE OF CASES CITED.

xv

			Page
Littlechild v. Banks	-	7 Q. B. 739	- 726
Lomax v. Landells	-	6 Com. B. 577	- 580
Longhead dem. Hopkins v. Phelps	-	2 W. Bl. 704	- 239
Lowther v. Cavendish	-	Amb. 356. S. C. 1 <i>Eden</i> , 99	- 482
Luddington v. Kime	-	{ 1 <i>Ld. Raym.</i> 203. S. C. 3 <i>Lev.</i>	
		431	- 234
Ludlow, Mayor of, v. Charlton	-	6 M. & W. 815. 822	- 635
Lupton v. White	-	15 Ves. 432. 439	- 128
Luttrell's Case	-	4 Rep. 86 a.	- 119. 302. 830

M.

McAlpine v. Poles	-	1 Cro. & M. 795. S. C. 3 <i>Tyr.</i> 781	589
MacDougall v. Paterson	-	11 Com. B. 755	- 259
Macgregor v. Keily	-	4 Exch. 801	- 868
— v. Dover and Deal Railway &c. Company	-	{ 18 Q. B. 618	- 470
Mackinnon v. Sewell	-	5 Sim. 78; 2 <i>Myl. & K.</i> 202	- 241
Magor v. Chadwick	-	11 A. & E. 571	- 308
Mallalieu v. Anglo Californian Gold Mining Co.	-	<i>Maidstone Spring Assizes</i> , 1852	746
Manning v. Wasdale	-	5 A. & E. 758	- 309
Marks, Ex parte	-	3 Mont. & Ayr. 521	- 608
Marshall, Ex parte	-	{ 1 Mont. & Ayr. 118; Mont. & Bligh, 242	- 606
Marsh v. Higgins	-	9 Com. B. 551	- 867
Martin v. Goble	-	1 Camp. 320	- 120
Matures v. Westwood	-	1 Cro. & M. 89. S. C. <i>Gouldsb.</i> 175	677
Maving v. Todd	-	1 Stark. N. P. C. 72	- 786
Mayhew v. Locke	-	7 <i>Taunt.</i> 63	- 579
Meadows v. Parry	-	1 Ves. & B. 124	- 241
Meyer v. Everth	-	4 <i>Campb.</i> 22	- 567
Mildmay v. Standish	-	<i>Cro. Eliz.</i> 34. 35	- 825
Mitchinson v. Hewson	-	7 T. R. 348	- 266
Monypenny v. Dering	-	{ 2 <i>De G. Macn. & G.</i> 145; 7 <i>Hare</i> , 568; 16 M. & W. 418; 9 Com. B. 700	- 242
Moon v. Durden	-	2 Exch. 22	- 344. 769. 867
Moore v. Rawson	-	3 B. & C. 332	- 126
Morgan v. Lute	-	1 Chit. Rep. 381	- 774
Morris v. Norfolk	-	1 <i>Taunt.</i> 212	- 266
— v. Norfolk, Duke of	-	9 Sim. 472. 492-3	- 167
Mount v. Larkins	-	8 <i>Bing.</i> 195	- 588
Munk v. Clarke	-	10 <i>Bing.</i> 102	- 508
Mure v. Kaye	-	4 <i>Taunt.</i> 34	- 382
Murray v. Jones	-	3 Ves. & B. 313	- 241
Musgrove v. Newell	-	{ 1 M. & W. 582. S. C. <i>Tyr.</i> & G. 957	- 382

N.

Neale v. Ratcliff	-	15 Q. B. 916	- 675
Needham v. Bristowe	-	4 Man. & G. 262	- 791
Newman v. Newman	-	10 Sim. 51	- 237
Norton v. Herron	-	Ry. & M. 229	- 508
Norwich, Mayor of, v. Norfolk Railway Company	-	{ 4 E. & B. 397	- 470. 632

TABLE OF CASES CITED.

	O.		Page
O'Connell v. The Queen	-	11 <i>Cl. & F.</i> 155. 214. 232. 251	754
O'Connor v. Majoribanks	-	4 <i>M. & G.</i> 455	376
Orchard v. Moxsey	-	2 <i>E. & B.</i> 206	259
Ormrod v. Huth	-	14 <i>M. & W.</i> 651	563
Osborne v. Rogers	-	1 <i>Saud.</i> 267	434
Ostler v. Cooke	-	13 <i>Q. B.</i> 143	831
Oxford, Chancellor &c., v. Taylor	-	1 <i>Q. B.</i> 952	657
Owen, Ex parte	-	1 <i>Dowl. P. C.</i> 511	774
	P.		
Panton v. Williams	-	2 <i>Q. B.</i> 169. 186	382
Payne v. Haine	-	16 <i>M. & W.</i> 541	676
Peeters v. Opie	-	2 <i>Wms. Saud.</i> 352. 6th ed.	672
Percival v. Caney	-	<i>Chanc.</i> January 26, 1852	369
Perkins v. Kempland	-	2 <i>W. Bl.</i> 1106	599
Peter v. Daniel	-	5 <i>Com. B.</i> 568. 577	297
Philips v. Philips	-	3 <i>Hare.</i> 281. 299	139
Pickford v. Grand Junction Railway Co.	8	<i>M. & W.</i> 372	786
Pickman v. Collis	-	3 <i>Dowl. P. C.</i> 429	579
Pilbow v. Pilbow's Atmospheric Rail-	{	5 <i>Com. B.</i> 440	463
way Company		5 <i>Com. B.</i> 440	
Pipe v. Steele	-	9 <i>Q. B.</i> 733	494
Pistol v. Richardson	-	2 <i>P. Wms.</i> 459, note (g)	483
Pitman v. Woodbury	-	3 <i>Exch.</i> 4	318
Pittam v. Foster	-	1 <i>B. & C.</i> 248	266
Plymouth, Countess of, v. Throgmorton	1	<i>Salk.</i> 65	434
Poole v. Hill	-	6 <i>M. & W.</i> 835	677
— v. Hobbs	-	9 <i>Dowl. P. C.</i> 113	792
Pordage v. Cole	-	{ 1 <i>Wms. Saud.</i> 303 c. note (4), (6th ed.)	463. 885
Pott v. Clegg	-	16 <i>M. & W.</i> 321	725
Potter v. Nicholson	-	8 <i>M. & W.</i> 294	792
Power v. Barham	-	4 <i>A. & E.</i> 473	563
Prescott v. Hadow	-	5 <i>Exch.</i> 726	868
Preston v. Liverpool, Manchester and	{	1 <i>Sim. N. S.</i> 586. 598	464
Newcastle upon Tyne Junction Rail-		way Company	
Proctor v. Bishop of Bath and Wells	2	<i>H. Bl.</i> 358	237
Pye v. Mumford	-	1 <i>Q. B.</i> 666	572
	R.		
Randall v. Moon	-	13 <i>Com. B.</i> 261	758
Re Crosby Tithes	-	13 <i>Q. B.</i> 761	150
Rees v. Watts	-	11 <i>Exch.</i> 410	857
Reeves v. Lambert	-	4 <i>B. & C.</i> 214	445
Regicides, Case of	-	<i>Kelyng.</i> 7. 10	644
Regil v. Green	-	1 <i>M. & W.</i> 328	446
Regina v. Aberdare Canal Company	14	<i>Q. B.</i> 854	689
— v. Adderbury East	-	5 <i>Q. B.</i> 187	852
— v. Arkwright	-	12 <i>Q. B.</i> 860	690

TABLE OF CASES CITED.

xvii

		Page
Regina v. Benjeworth	-	3 <i>E. & B.</i> 637
— v. Cambridge Gas Light Co.	-	8 <i>A. & E.</i> 73
— v. Caverswall	-	10 <i>A. & E.</i> 270
— v. Cheltenham Commissioners	-	1 <i>Q. B.</i> 467
— v. Colbeck	-	12 <i>A. & E.</i> 161
— v. Coles	-	8 <i>Q. B.</i> 75
— v. Cottle	-	16 <i>Q. B.</i> 412
— v. Dale	-	17 <i>Q. B.</i> 64
— v. Darton	-	2 <i>D. & L.</i> 500
— v. East Lancashire Railway Co.	9 <i>Q. B.</i> 980	791
— v. Ely, Isle of,	-	15 <i>Q. B.</i> 827. 843
— v. Fouch	-	2 <i>Q. B.</i> 308
— v. Great Western Railway Co.	5 <i>Q. B.</i> 597	684
— v. —	-	13 <i>Q. B.</i> 327
— v. Hammersmith Bridge Co.	15 <i>Q. B.</i> 369	342
— v. Hammond	-	17 <i>Q. B.</i> 772
— v. Hartlepool	-	2 <i>Loundes, M. & P.</i> 666
— v. Haughton	-	1 <i>E. & B.</i> 501
— v. Hodson	-	4 <i>Q. B.</i> 648, note (b)
— v. How	-	11 <i>A. & E.</i> 159
— v. Hull Dock Company	-	7 <i>Q. B.</i> 2
— v. Hulme	-	4 <i>Q. B.</i> 538
— v. Justices of Buckinghamshire	4 <i>E. & B.</i> 259, note (b)	366
— v. — Glamorganshire	13 <i>Q. B.</i> 561	362
— v. — Herefordshire	2 <i>D. & L.</i> 500, note (a)	419
— v. — Hertfordshire	6 <i>Q. B.</i> 753	418. 424
— v. — Lancashire	2 <i>Q. B.</i> 305	364
— v. — Salop	4 <i>E. & B.</i> 257	366
— v. — Suffolk	2 <i>Q. B.</i> 35	363
— v. —	18 <i>Q. B.</i> 417	424
— v. Kensington	12 <i>Q. B.</i> 654	689
— v. Lewis	6 <i>A. & E.</i> 881	397
— v. Liverpool, Recorder of	15 <i>Q. B.</i> 1070	363
— v. London, Brighton and South Coast Railway Company	15 <i>Q. B.</i> 313	340
— v. London and South Western Railway Company	1 <i>Q. B.</i> 558	340
— v. Manchester and Leeds Railway Company	8 <i>A. & E.</i> 413	792
— v. Mawgan	8 <i>A. & E.</i> 496	766
— v. Middlesex	3 <i>B. & Ad.</i> 201	853
— v. North and South Shields Ferry Company	1 <i>E. & B.</i> 140	343
— v. Owen	17 <i>Q. B.</i> 476	187
— v. Polwart	1 <i>Q. B.</i> 818	99
— v. Priest Hutton	15 <i>Q. B.</i> 59	557
— v. Ripon	7 <i>Q. B.</i> 225	456
— v. St. James, Colchester	2 <i>Loundes, M. & P.</i> 314	419
— v. St. Lawrence in Appleby	6 <i>Q. B.</i> 842	452
— v. St. Mary Kalendar	9 <i>A. & E.</i> 626	452
— v. St. Marylebone	15 <i>Q. B.</i> 399	453
— v. St. Pancras, Vestrymen &c. of	11 <i>A. & E.</i> 15. 26.	720
— v. St. Peter, Barton-on-Humber	17 <i>Q. B.</i> 630	362
— v. Scaife	17 <i>Q. B.</i> 288	773
— v. Tithe Commissioners	14 <i>Q. B.</i> 459	163. 170
— v. —	15 <i>Q. B.</i> 620	149. 165

TABLE OF CASES CITED.

		Page
Regina v. Treasury, Lords of, In re Hand	4 A. & E. 984	- 701
— v. ————— In re Queen	16 Q. B. 357	- 701
Dowager's Annuity		- 701
— v. ————— In re Smyth	4 A. & E. 976	- 701
— v. Whitmarsh	15 Q. B. 600	- 276
— v. Woods and Forests, Commissioners of	15 Q. B. 761. 772	- 701
Reid v. Allan	7 Exch. 326	- 11
Rex v. All Saints, Worcester	6 M. & S. 194	- 375
— v. Barnes	1 B. & Ad. 113	- 342
— v. Bath, Corporation of	14 East, 609	- 711
— v. Bathwick	2 B. & Ad. 609	- 376
— v. Berkswell	6 A. & E. 282	- 455
— v. Bridgewater	3 T. R. 550	- 453
— v. Brighton Gas Light Company	5 B. & C. 466	- 711
— v. Cambridge, Chancellor &c. of University	6 T. R. 89	- 656
— v. Chester, Archdeacon of	1 A. & E. 342	- 720
— v. Clace	4 Burr. 2456. 2459	- 774
— v. Cliviger	2 T. R. 263	- 375
— v. Derby	3 B. & Ad. 147	- 851
— v. Devon	5 B. & Ad. 383	- 848
— v. Dodd	9 East, 516. 527	- 51
— v. Downshire, Marquis	4 A. & E. 698	- 873
— v. East India Company, Directors of	4 B. & Ad. 530	- 701
— v. Ecclesfield	1 B. & Ald. 348	- 763
— v. Field	5 T. R. 587	- 454
— v. Filewood	2 T. R. 145	- 703
— v. Foleshill	2 A. & E. 593	- 711
— v. Gwyer	2 A. & E. 216. 226	- 685
— v. Havering Atte Bower, Steward &c.	5 B. & Ald. 691	- 494
— v. Heckmondwicke	2 Doug. 564	- 452
— v. Hull Dock Company	1 T. R. 219	- 327
— v. Kent, Inhabitants of	13 East, 220	- 355
— v. Kerrison	3 M. & S. 526	- 355
— v. Kingswinford	7 B. & C. 236	- 340
— v. Lambeth, Rector of	8 A. & E. 356	- 719
— v. Lindsey, Inhabitants of	14 East, 317	- 355
— v. Machynleth	2 B. & C. 166	- 767
— v. McKenzie	Russ. & Ry. 429	- 769
— v. Manchester and Salford Waterworks Company	1 B. & C. 630	- 712
— v. Manning	1 Burr. 377	- 836
— v. Mead	1 Burr. 542	- 783
— v. Painswick	Burr. S. C. 465	- 453
— v. Pitts	2 Doug. 662	- 397
— v. Rochdale Waterworks Company	1 M. & S. 634	- 711
— v. St. Giles, Cambridge	5 M. & S. 260	- 767
— v. St. Mary Lambeth, Churchwardens of	1 A. & E. 346, note (b)	- 720
— v. Shrewsbury, Trustees for Paving	3 B. & Ad. 216	- 712
— v. South Kilvington	5 Q. B. 216	- 453
— v. Stoughton	2 Wms. Saund. 158 h. 6th ed.	- 766
— v. Trafford	1 B. & Ad. 874	- 298
— v. Treasury, Lords of	4 A. & E. 286	- 701

TABLE OF CASES CITED.

xix

			Page
Rex v. Wakefield	-	1 <i>Burr.</i> 485	- 774
— v. Walsall	-	2 <i>Cald.</i> 35.	- 453
— v. Warren	-	1 <i>Coup.</i> 370	- 186
— v. Woobley	-	2 <i>East.</i> 68	- 454
— v. West Riding of Yorkshire	-	5 <i>Burr.</i> 2594	- 852
— v. Woodfall	-	2 <i>Stra.</i> 1131	- 704
— v. Woking	-	4 <i>A. & E.</i> 49	- 340
— v. Wiseman	-	2 <i>Smith's Rep.</i> 617	- 782
Ricketts v. Salwey	-	2 <i>B. & Ald.</i> 360	- 299
Ridley v. Plymouth Grinding and Bak-	{	2 <i>Exch.</i> 711	38. 637
ing Company	-	5 <i>B. & C.</i> 866	- 217
Right v. Creber	-	5 <i>East.</i> 491. 498	- 452
— dem. Fisher v. Cuthell	-	15 <i>Q. B.</i> 17	- 354
Roberts v. Hunt	-	{ 2 <i>C. M. & R.</i> 561, 562. <i>S. C.</i> 5	
— v. Williams	-	<i>Tyr.</i> 583. 584	- 579
Robson v. Oliver	-	10 <i>Q. B.</i> 704	- 723
Rochdale Canal Company v. King	-	14 <i>Q. B.</i> 122	- 298
— v.	-	2 <i>Sim. N. S.</i>	- 307
— v. Walmsley	14 <i>Q. B.</i> 136, note (e)	- 291	
Rochester, Dean and Chapter of, v. Pierce	1 <i>Campb.</i> 466	- 634	
Roe v. Birkenhead &c. Junction Rail-	{ 7 <i>Exch.</i> 36	- 742	
way Company	-	1 <i>Camp.</i> 309. 313	- 300
Rogers v. Allen	-	1 <i>Cr. & M.</i> 637. <i>S. C.</i> 3 <i>Tyr.</i> 654	723
— v. Langford	-	<i>Cro. Car.</i> 292	- 482
Rose v. Bartlett	-	5 <i>E. & B.</i> 248	- 637
Royal British Bank v. Turquand	-	{ 11 <i>East.</i> 375, note (a)	- 873
Rugby Charity, Trustees of, v. Merry	-	<i>weather</i>	
Russel v. Buchanan	-	{ 2 <i>Cr. & M.</i> 561. <i>S. C.</i> 4 <i>Tyrwh.</i>	
—	-	384	- 241
Ryalls v. Bramall	-	1 <i>Exch.</i> 734. 738	- 680
— v. Queen, The	-	11 <i>Q. B.</i> 795. 798	- 679
S.			
St. Martin, Overseers of, v. Warren	-	1 <i>B. & Ald.</i> 491	- 598
Salford v. Till	-	4 <i>Bing.</i> 75	- 637
St. Saviour's, Churchwardens of, v. Smith	1 <i>W. Bl.</i> 351. <i>S. C.</i> 3 <i>Burr.</i> 1271	671	
Salmon, Dr., v. Hamburg Company	-	1 <i>Ca. Chan.</i> 204	- 31
Sanders v. Coward	-	15 <i>M. & W.</i> 48. 56	- 599
— v. St. Neots Union	-	8 <i>Q. B.</i> 810	- 637
Seeley v. Powers	-	3 <i>Dowl. P. C.</i> 372	- 779
Senhouse v. Christian	-	1 <i>T. R.</i> 560	- 880
Seymour v. Maddox	-	16 <i>Q. B.</i> 326	- 385
Shaw v. Roberts	-	2 <i>Dowl. P. C.</i> 25	- 774
Shipman v. Thompson	-	<i>Willes.</i> , 103	- 858
Shirley v. Newman	-	1 <i>Esp. N. P. C.</i> 266	- 500
Silver v. Barnes	-	6 <i>New Ca.</i> 180	- 275
Simpson v. Lord Howden	-	9 <i>Cl. & Fin.</i> 61	- 463
Sinclair v. Bowles	-	9 <i>B. & C.</i> 92	- 644
Skinner's Company v. Jones	-	3 <i>New Ca.</i> 481	- 599
Smith v. Brown	-	1 <i>Cro. & J.</i> 542. <i>S. C.</i> 1 <i>Tyr.</i> 486	580
— v. Cator	-	2 <i>B. & Ald.</i> 778	- 324
— v. Hull Gas Company	-	{ 8 <i>Com. B.</i> 668. 675. 11 <i>Com. B.</i>	
— v. Poole	-	897	37. 637
	b 2	12 <i>Sim.</i> 17	- 138

TABLE OF CASES CITED.

			Page
Southwark Bridge Company v. Sills	-	2 <i>Car. & P.</i> 371	- 634
Sparks v. Liverpool Waterworks, Proprietors of	-	13 <i>Ves.</i> 428	- 746
<i>Speakman's Case</i>	-	1 <i>Q. B.</i> 965, note (a)	- 657
<i>Spencer's Case</i>	-	5 <i>Rep.</i> 16 a	- 672
Stafford, Mayor of, v. Till	-	4 <i>Bing.</i> 75	- 734
Stevens v. Jeacocke	-	11 <i>Q. B.</i> 731	- 886
Stocken v. Collin	-	7 <i>M. & W.</i> 515	- 390
Stoughton v. Reynolds	-	2 <i>Str.</i> 1045	- 720
Stourbridge Canal Company v. Wheeley	2 <i>B. & Ad.</i> 792		- 538
Stuart, Lord James, v. London and North Western Railway Company	{ 1 <i>De G. Macn. & Gord.</i> 721		- 466
<i>Stulz v. Wyatt</i>	-	6 <i>Q. B.</i> 666	- 792
Surtees v. Ellison	-	9 <i>B. & C.</i> 750	- 768
T.			
Tanner v. Christian	-	4 <i>E. & B.</i> 591	- 516
<i>v. Smart</i>	-	6 <i>B. & C.</i> 603	- 138. 266
Taylor v. Clemson	-	2 <i>Q. B.</i> 978. 11 <i>Cl. & Fin.</i> 651	836
<i>v. Young</i>	-	3 <i>B. & Ald.</i> 521	- 599
Teal v. Auty	-	2 <i>Brod. & B.</i> 99	- 252
Tegetmeyer v. Lumley	-	<i>Willes</i> , 264, note	- 860
Thame v. Boast	-	12 <i>Q. B.</i> 808	- 759
Thicknesses v. Lancashire Canal Company	4 <i>M. & W.</i> 471	537. 823	830
Thistlewood, Ex parte	-	19 <i>Ves.</i> 236	- 609
Thomas v. Cadwallader	-	<i>Willes</i> , 496	- 672
<i>v. Evans</i>	-	2 <i>East.</i> 488	- 218
<i>v. Hewes</i>	-	{ 2 <i>C. & M.</i> 530. <i>S. C.</i> 4 <i>Tyr.</i> 335. 338	- 508
<i>v. Thomas</i>	-	{ 2 <i>Cro. M. & R.</i> 34. <i>S. C.</i> 5 <i>Tyr.</i> 804	- 121
Thompson, Ex parte	-	2 <i>Deacon & Chitty</i> , 126	- 606
<i>v. Charnock</i>	-	8 <i>T. R.</i> 139	- 432
<i>v. Lady Lawley</i>	-	2 <i>Bos. & P.</i> 303	- 482
<i>v. Thompson</i>	-	2 <i>New Ca.</i> 168	- 598
<i>v. Universal Salvage Company</i>	3 <i>Exch.</i> 310		- 868
<i>v. Whatley</i>	-	16 <i>Q. B.</i> 189	- 601
Thomson v. Daveport	-	9 <i>B. & C.</i> 78	- 508
Thurnell v. Balbirnie	-	2 <i>M. & W.</i> 786	- 435
Tickle v. Brown	-	4 <i>A. & E.</i> 369	- 573
Tilson v. Warwick Gas Light Company	4 <i>B. & C.</i> 962		- 35
Towler v. Chatterton	-	6 <i>Bing.</i> 258	- 245
Trafford v. The King	-	{ 2 <i>Cro. & J.</i> 265. <i>S. C.</i> 2 <i>Tyr.</i> 201. 8 <i>Bing.</i> 204	- 298
Tress v. Savage	-	4 <i>E. & B.</i> 37	- 502
Trueman v. Hurst	-	1 <i>T. R.</i> 49	- 254
Tuckey v. Hawkins	-	4 <i>Com. B.</i> 655	- 599
Turner v. Stones	-	1 <i>Dowl. & L.</i> 122	- 723
Tyson v. Smith	-	6 <i>A. & E.</i> 745. 9 <i>A. & E.</i> 406	309
U.			
University College v. Garton	-	10 <i>Q. B.</i> 760	- 164
V.			
Vyse v. Wakefield	-	6 <i>M. & W.</i> 442. 7 <i>M. & W.</i> 126	743

TABLE OF CASES CITED.

xxi

	W.		Page
Walsh, Re	-	- 1 <i>E. & B.</i> 383	- 789
Ward v. Evans	-	- 2 <i>Ld. Raym.</i> 928	- 725
Ward v. Eyre	-	- 2 <i>Bulstr.</i> 323	- 128
Warn v. Bickford	-	- 7 <i>Price,</i> 550	- 673
Warner v. Haines	-	- 6 <i>Car. & P.</i> 666	- 445
Watson v. Murrel	-	- 1 <i>Car. & P.</i> 307	- 508
——— v. Thorp	-	- { 1 <i>Philim. Ecc. Rep.</i> 269. 279. note (a)	- 753
Watts v. Rees	-	- 9 <i>Exch.</i> 696	- 857
Webb v. Direct London and Portsmouth Railway Company	-	- } 9 <i>Hare,</i> 129	- 464
Weedon v. Timbrell	-	- 5 <i>T. R.</i> 357	- 101
West v. Baxendale	-	- 9 <i>Com. B.</i> 141	- 383
Wetherell v. Weighill	-	- 3 <i>Y. & C.</i> 243	- 151
Whitaker v. Harrold	-	- 11 <i>Q. B.</i> 163. 172	- 679
Whitcomb v. Whiting	-	- 1 <i>Doug.</i> 652	- 265
White v. Barber	-	- 5 <i>Burr.</i> 2703	- 242
Wigton, Overseers of, v. Overseers of Snaith	-	- } 16 <i>Q. B.</i> 496	- 556
Wilde v. Sheridan	-	- { 21 <i>L. J., N. S., Q. B. (Bail Court),</i> 260	- 787
Wilkinson v. Anglo Californian Gold Mining Company	-	- } 18 <i>Q. B.</i> 728	- 748
Williams v. Jarman	-	- { 13 <i>M. & W.</i> 123. <i>S. C. 2 Dowl.</i> & <i>L.</i> 212	- 671
Willis, In re	-	- 4 <i>Exch.</i> 530	- 601
Wilson v. Abbott	-	- 3 <i>B. & C.</i> 88	- 498
——— v. Eden	-	- { 11 <i>Beav.</i> 237. 253; 5 <i>Exch.</i> 752	- 474
——— v. Mount	-	- 2 <i>Beav.</i> 397	- 241
Winsmore v. Greenbank	-	- <i>Willes,</i> 577	- 101
Winter v. Mouseley	-	- 2 <i>B. & Ald.</i> 802	- 603
Wollen v. Smith	-	- 9 <i>A. & E.</i> 505	- 760
Woodcock v. Houldsworth	-	- 10 <i>M. & W.</i> 124	- 390
Wood v. Veal	-	- 5 <i>B. & Ald.</i> 454	- 874
——— v. Waud	-	- 3 <i>Exch.</i> 748	- 308
Woodyer v. Hadden	-	- 5 <i>Taunt.</i> 125	- 873
Worrall v. Jones	-	- 7 <i>Bing.</i> 395	- 494
Worsley v. Wood	-	- 6 <i>T. R.</i> 710	- 435
Wright v. Court	-	- 4 <i>B. & C.</i> 596	- 382
——— v. Williams	-	- { 1 <i>M. & W.</i> 100. <i>S. C. Tyr. &</i> G. 375	- 572
Wyld v. Pickford	-	- 8 <i>M. & W.</i> 443. 458	- 786
Wyllie v. Wilkes	-	- 2 <i>Doug.</i> 512	- 603
Wymer v. Kemble	-	- 6 <i>B. & C.</i> 479	- 523
	Y.		
Yarborough v. Bank of England	-	- 16 <i>East,</i> 6	- 742
Yard v. Ford	-	- 2 <i>Wms. Saund.</i> 172	- 120
Young, Ex parte	-	- 2 <i>Deac.</i> 240	- 508
——— v. Taylor	-	- 8 <i>Taunt.</i> 315	- 599

ERRATA.

- Page 88. last line but 7, for "*Reed*" read "*Reid*."
416. marginal note, lines 8, 9, for "confirmed" read "quashed."
425. marginal note, line 12, for "apportionable" read "apportionable."
455. note (b), for "*Rex*" read "*Regina*."
486. last line but 10, for "demise" read "devise."
633 to 640. marginal name of case, for "NORTH WESTERN" read "LONDON and
NORTH WESTERN."
637. note (d), add "248."
640. note (a), add "409."

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Ambergate, &c., Railway Company, <i>Regina v.</i>	xvii.	{ 362 957	Aston nigh Birmingham, Inhabitants of, <i>Regina v.</i>	xii.	26
&c., Railway Company, <i>Cort v.</i>	xvii.	127	habitants of, <i>Yates v.</i>	iv.	182
Ambler, <i>Turner v.</i>	x.	252	Atcheson, <i>Scarpellini v.</i>	vii.	864
Amott v. Holden	xviii.	593	Atherstone, <i>Nickells v.</i>	x.	944
Anderson, <i>Arbouin v.</i>	i.	498	Atkinson v. <i>Raleigh</i>	iii.	78
<i>v. Boynton</i>	xiii.	308	Attenborough, <i>Pennell v.</i>	iv.	869
<i>Fannin v.</i>	vii.	811	Attercliffe cum Darnal, Inhabitants of, <i>Regina v.</i>	xiii.	933
<i>Meyrick v.</i>	xiv.	719	Attwood, <i>Toller v.</i>	xv.	{ 929 1084
<i>Regina v.</i>	ii.	740	Austen, <i>Gridley v.</i>	xvi.	504
Inhabitants of, <i>Regina v.</i>	ix.	663	Austin, <i>Apsdin v.</i>	v.	671
<i>v. Thornton</i>	iii.	271	<i>v. Manchester, Sheff-</i>		
<i>v. Towgood</i>	i.	245	field &c. Railway Company	xvi.	600
Andrews, <i>Adams v.</i>	xv.	{ 284 1001	Australasia, Bank of, <i>v. Nias</i>	xvi.	717
<i>Doe d. France v.</i>	xv.	756	Avery, <i>Regina v.</i>	xviii.	576
<i>v. Marris</i>	i.	3	<i>Schmaltz v.</i>	xvi.	655
<i>v. Turner</i>	iii.	177	Ayling, <i>Hay r.</i>	xvi.	423
Angell, <i>Doe dem. Angell v.</i>	ix.	328	Ayton <i>v. Abbott</i>	xiv.	1
Anglo-Californian Gold Mining Company, <i>Stewart v.</i>	xviii.	736		B.	
<i>Wilkinson, v.</i>	xviii.	728	Bacon <i>v. Smith</i>	i.	345
Ansell <i>v. Baker</i>	xv.	20	Badcock, <i>Regina v.</i>	vi.	787
Apothecaries' Company <i>v.</i> Greenough	i.	799	Badger, <i>Regina v.</i>	iv.	468
Appledore, <i>Tithe Commu-</i> <i>tation, Re</i>	viii.	139	Bales <i>v. Wingfield</i> note (a)	iv.	580
Arbouin <i>v. Anderson</i>	i.	498	Bagshaw, <i>Duke of Rutland v.</i>	xiv.	869
Archibald, <i>Sieveright v.</i>	xvii.	103	Bailey <i>v. Bracebridge</i>	xiii.	815
Arden <i>v. Sullivan</i>	xiv.	832	<i>v. Haines</i>	xiii.	815
Ardsley, <i>Churchwardens of,</i> <i>Regina v.</i>	v.	{ 71 163	<i>v. Harris</i>	xii.	905
Argyll, <i>Duke of, Lake v.</i>	vi.	477	<i>v. Holford</i>	xiii.	426
Arkwright, <i>Regina v.</i>	xii.	960	<i>v. Holford</i>	viii.	1000
Armistead <i>v. Wilde</i>	xvii.	261	<i>v. Macaulay</i>	xiii.	815
Armitage <i>v. Insole</i>	xiv.	728	<i>v. Pearson</i>	xiii.	815
Armour, <i>Gooderden v.</i>	iii.	956	Baillie <i>v. Moore</i>	viii.	489
Armytage <i>v. Haley</i>	iv.	917	Bainbridge, <i>Hall v.</i>	v.	233
Arnaud, <i>Barrow v.</i>	viii.	595	<i>v. Hedley v.</i>	xii.	699
<i>Regina v.</i>	ix.	806	<i>v. Lax</i>	iii.	316
Arnold, <i>Regina v.</i>	xviii.	553	<i>v. Wade</i>	ix.	819
Aylesbury with Walton, Inhabitants of, <i>Regina v.</i>	ix.	261	Baker, <i>Ansell v.</i>	xv.	89
Ashburton, Inhabitants of, <i>Regina v.</i>	viii.	871	<i>v. Greenhill</i>	iii.	148
<i>Lord, Regina v.</i>	v.	48	<i>v. Rusk</i>	xv.	870
Ashley, <i>Faithful v.</i>	i.	183	Bakewell, Inhabitants of, <i>Regina v.</i> note (a)	vii.	601
<i>Doe dem. Renow v.</i>	x.	663	Baldwin, <i>Howkins v.</i>	xvi.	375
Ashmole <i>v. Wainright</i>	ii.	837	Ball, <i>Smith v.</i>	ix.	361
Ashton, <i>Lock v.</i>	xii.	871	Bamber, <i>Regina v.</i>	v.	279
<i>under Lyne, Mayor &c. of, Slater v.</i>	xviii.	398	Banbury Union, <i>Guardians of, v. Robinson</i>	iv.	919
Ashton's Case	vii.	169	Bangor, Inhabitants of, <i>Regina v.</i> note (b)	xi.	399
Aspin <i>v. Austin</i>	v.	671	Overseers of, <i>Regina v.</i>	x.	91

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Betteley <i>v.</i> Reed	iv.	511	Blagg, Sturt <i>v.</i> In Error	x.	906
Betts, Regina <i>v.</i>	xv.	540	Blair <i>v.</i> Ormond. In Error	xiv.	732
— <i>v.</i>	xvi.	1022		xvii.	423
— <i>v.</i> Smyth	ii.	113	Blake <i>v.</i> Midland Railway		
— <i>v.</i> Walker	xiv.	363	Company	xviii.	93
Bevan <i>v.</i> Gething	iii.	740	— <i>v.</i>	vi.	126
Bickford <i>v.</i> Shews	i.	938	Blakemore, Regina <i>v.</i>	xiv.	544
Bickley, King <i>v.</i>	ii.	419	Blakesley <i>v.</i> Smallwood	viii.	538
Bicknell, Barton <i>v.</i>	xiii.	303	Blaksley, Rowland <i>v.</i>	i.	403
— <i>v.</i> Wetherall	i.	914	— <i>v.</i>	iii.	413
Biddulph <i>v.</i> Chamberlain	xvii.	351	Blanchard <i>v.</i> De La Croucè	ix.	869
Billett, Doe dem. Edney <i>v.</i>	vii.	976	Blanchenay <i>v.</i> Burt	iv.	707
Binckes, Jordan <i>v.</i>	xiii.	757	Bland <i>v.</i> Lord Alvanley		
Bingham, Regina <i>v.</i>	iv.	877	note (a)	xv.	994
— <i>v.</i> Stanley	ii.	117	— <i>v.</i> Dax	viii.	126
Binks, Harland <i>v.</i>	xv.	713	Blane, Regina <i>v.</i>	xiii.	769
Biram, Regina <i>v.</i>	xvii.	969	— Sayles <i>v.</i>	xiv.	205
Birch, Coates <i>v.</i>	ii.	252	Blanford <i>v.</i> Morrison. In		
— Freeman <i>v.</i>	note (a)	492	Error	xv.	724
— King <i>v.</i>	iii.	425	Blanshard, Regina <i>v.</i>	xiii.	318
— <i>v.</i>	vii.	669	Blick, Cooper <i>v.</i>	ii.	915
— Wyylie <i>v.</i>	iv.	566	Bloxham, Inhabitants of,		
Bird <i>v.</i> Jones	vii.	742	Regina <i>v.</i>	vi.	528
— <i>v.</i> Smith	xii.	786	Bluck <i>v.</i> Bateman	xviii.	870
Birkenhead Dock, Trustees of, <i>v.</i> Birkenhead, Over- seers of (2 E. & B. 148)	xviii.	702	Blogg, Bury <i>v.</i>	xii.	877
Birmingham, Inhabitants of, Regina <i>v.</i>	v.	210	Bluck, Rackham <i>v.</i>	ix.	691
— <i>v.</i>	viii.	410	— Sharp <i>v.</i>	x.	280
Borough of, Re- gina <i>v.</i>	x.	116	Blunt, Benson <i>v.</i>	i.	870
Churchwardens of, <i>v.</i> Shaw	x.	868	Boast, Thame <i>v.</i>	xii.	808
Bristol and Thames Junction Railway Company <i>v.</i> Lock	i.	256	Bockett, Brooks <i>v.</i>	ix.	847
— <i>v.</i> White	i.	282	Bodley <i>v.</i> Reynolds	viii.	779
— and Gloucester Railway Company, Reg. <i>v.</i>	ii.	47	Bold, Doe dem. Birmingham		
— <i>v.</i>	iii.	223	Canal Company <i>v.</i>	xi.	127
Mayor, &c., <i>v.</i>	xvi.	623	— London Assurance		
Wright			Company <i>v.</i>	vi.	514
Birmingham and Oxford Junction Railway Com- pany, Regina <i>v.</i>	xv.	634	— <i>v.</i> Rotheram	viii.	11
Birrell, Fisher <i>v.</i>	ii.	239	Bolland, Tomlinson <i>v.</i>	iv.	642
Bishop <i>v.</i> Curtis	xviii.	908	Bolton, Regina <i>v.</i>	i.	66
Black, Davis <i>v.</i>	i.	900	Bond <i>v.</i> Nurse	x.	244
Blackall, Mills <i>v.</i>	xi.	358	Bonaker <i>v.</i> Evans	xvi.	162
Blackford <i>v.</i> Hill	xv.	116	Bonney, Brownell <i>v.</i>	i.	39
Blackmore, Dobson <i>v.</i>	ix.	991	Boodle, Fountain <i>v.</i>	iii.	5
Blackwell <i>v.</i> McNaughten	i.	127	— Newton <i>v.</i>	ix.	948
Blagg <i>v.</i> Sturt	x.	899	Boorman <i>v.</i> Brown	iii.	511

— *v.* Ransford *v.* In
Error

ii. 972

v. 310

Bostock *v.* North Stafford-

shire Railway Company

xviii. 777

— *v.* Sidebottom

xviii. 813

— Sidebottom *v.*

xviii. 829

Boucher *v.* Murray

vi. 362

REPORTED IN THE NEW SERIES.

[5]

	Vol.	Page		Vol.	Page
Boucher, Regina v.	iii.	641	Brier, Regina v.	xiv.	568
Bough, Miles v.	iii.	845	Briggs v. Merchant Traders' Company	xiii.	167
Bourne v. Alcock	iv.	621	Bright v. Beard	iv.	832
Bousfield, Bulmer v.	ix.	986	Brightelmstone, Inhabitants of, Regina v.	i.	674
——— Doe d. Robinson v.	vi.	492	———— Poor, Directors of, Regina v.	vii.	549
——— Fife v.	vi.	100	Brightman, Oliver v.	iii.	342
Bowdon v. Hall	iv.	840	Brightside Bierlow, Inhabitants of, Regina v.	viii.	781
Bowditch, Doe dem. Drake v.	viii.	973	Brindle, O'Neil v.	xiii.	933
Bowdler's Case	xii.	612	British Guarantee Association, Walker v.	ix.	502
Bowen v. Owen	xi.	130	Brisco, Plumer v.	xviii.	277
——— Regina v.	xiii.	790	Bristol Dock Company, Regina v.	xi.	46
Bower, Cutler v.	xi.	973	———— v.	i.	535
——— Doe dem. Nicoll v.	xvi.	805	———— v.	i.	984
Bowers v. Nixon	xii.	546	———— v.	ii.	64
——— v. —— note (b)	xiii.	558	Bristol and Exeter Railway Company, Regina v.	iv.	162
Bowley, Chelsea Water-works Company v.	xvii.	358	———— Poor, Governor, &c., of, Regina v.	xiii.	405
Bowman, Doughty v. In Error	xi.	444	The Queen	xiii.	414
Bownes v. Marsh	x.	787	Broadley, Phillips v.	ix.	744
Boyce v. Webb	xv.	84	Brogden, Humphreys v.	xii.	739
Boyle v. Webster	xvii.	950	Bromage v. Vaughan	ix.	608
Boynton v. Anderson	xiii.	308	Bromley, Bear v.	xviii.	271
Boxall, Whittington v.	v.	139	Brooke, Colchester, Mayor of, v.	vii.	339
Bracebridge, Bailey v.	xiii.	815	Brooke, James v.	ix.	7
——— Baxter v.	xv.	533	——— v. Jenney	ii.	265
Bracegirdle v. Peacock	viii.	174	——— v.	vi.	323
Bradford, Inhabitants of, Regina v. note (h).	viii.	571	——— Fitzball v.	vi.	873
Bradley, Master, Pilots, &c., of Newcastle upon Tyne v. (2 E. & B. 428, note (a))	xviii.	144	Brooking, Scriveners' Company v.	iii.	95
Bradshaw's Arbitration	xii.	562	Brooks v. Bockett	ix.	847
Braine, Smith v.	xvi.	244	Broome v. The Queen. In Error	xii.	834
Braintree Union, Guardians of, Regina v.	i.	130	Brough v. Eisenberg	xiv.	446
Braithwaite v. Gardner	viii.	473	Broughton v. Jackson	xviii.	378
Bramwell, Doe dem. Pye v.	iii.	307	Brown, Boorman v. In Error	iii.	511
——— Whalley v.	xv.	775	——— v. Clegg	xvi.	681
Brandon v. Newington	iii.	915	——— Crofts v.	vii.	284
Brandt, Regina v.	xvi.	462	——— v. Glenn	xvi.	254
Branscombe v. Scarborough	vi.	13	——— v. Hutchinson	xiii.	185
——— Wheeler v.	v.	373	——— Jenkyns v.	xiv.	496
Branson, Eadon v.	ix.	579	——— v. Pegg	vi.	1
Brecon, Inhabitants of, Reginas v.	xv.	813	——— Regina v.	xiii.	654
Breeze v. Jerdein	iv.	585	——— v.	xvii.	833
Brenan's Case	x.	492	——— Wakefield v.	ix.	209
Brenton, Rogers v.	x.	26	Browne, Selby v.	vii.	620
Brewster, Bayne v.	ii.	375	——— Willington v.	viii.	169
Bricknell, Barton v.	xiii.	393			
Bridewell Hospital, Case of Bridgewater, Inhabitants of, Regina v. (10 A. & E. 639)	x.	859			
Brierly v. Kendall	i.	160			
	xvii.	937			

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Brownell <i>v.</i> Bonney	i.	39			
Bruck, Hamelin <i>v.</i>	ix.	306			
Brune <i>v.</i> Thompson	ii.	789			
——— <i>v.</i>	iv.	543	C.		
Brunton <i>v.</i> Hall	i.	792			
Brunswick, Duke of, <i>v.</i> Har- mer	xiv.	185			
——— <i>v.</i> Munden,	note xv.	683	Caldecote, Inhabitants of, Regina <i>v.</i>	xvii.	52
Munden <i>v.</i>	x.	656	Caldecott, Lear <i>v.</i>	iv.	123
Brydges <i>v.</i> Lewis	iii.	603	Caledonian Railway Com- pany, Regina <i>v.</i>	xvi.	19
Buchanan, Regina <i>v.</i>	viii.	883	Caldwell, Hunter <i>v.</i>	x.	69
Buckinghamshire, Justices of, Regina <i>v.</i>	iii.	800	——— <i>v.</i> In er- ror	x.	83
Buck, Stronghill <i>v.</i>	xiv.	781	Calthrop, Fletcher <i>v.</i>	vi.	880
Budge, Ex parte	xv.	761	Camberwell, Rent Charge, In re	iv.	151
Bull, Cardale <i>v.</i>	iv.	611	Cambridge, Mayor, &c., Re- gina <i>v.</i>	iv.	801
Bullock, Elwood <i>v.</i>	vi.	383	University of, Hallack <i>v.</i>	i.	593
Bulmer <i>v.</i> Bousfield note (a)	ix.	986	Cameron's Coalbrook, &c., Railway Company, Hal- ford <i>v.</i>	xvi.	442
Bunbury, Edwards <i>v.</i>	iii.	885	Campbell, Belcher <i>v.</i>	viii.	1
Bunch <i>v.</i> Kennington	i.	679	——— <i>v.</i> Hewlett	xvi.	258
Bunter <i>v.</i> Cresswell	xiv.	825	——— <i>v.</i> The Queen In error	xi.	799
Burdett, May <i>v.</i>	ix.	101	——— <i>v.</i> In Exchequer Chamber	xi.	814
Burder, Veley <i>v.</i> (12 A. & E. 265)	i.	387	Camrose, Inhabitants of, Re- gina <i>v.</i> note (a)	ii.	330
Burdon <i>v.</i> Benton	ix.	843	Canterbury, Archbishop of, Regina <i>v.</i>	xi.	483
Burghart, Lane <i>v.</i>	i.	933	Cardale <i>v.</i> Ball	iv.	611
Burling <i>v.</i> Read	xi.	904	Carew, Doe dem. Wynd- ham <i>v.</i>	ii.	317
Burmester <i>v.</i> Barron	xvii.	828	Carey, Regina <i>v.</i>	vii.	126
Burnby, Regina <i>v.</i>	v.	348	Carlton, Inhabitants of, Re- gina <i>v.</i>	xiv.	110
Burnell, Gale <i>v.</i>	vii.	850	Carmarthenshire, Justices of, Regina <i>v.</i>	x.	796
Burrage, Neeves <i>v.</i>	xiv.	504	Carnarvonshire, Justices of, Regina <i>v.</i>	ii.	325
Burrough, Doe dem. Lord Egremont <i>v.</i>	vi.	229	Carpenter, Doe dem. Camp- ton <i>v.</i>	xvi.	181
Burt, Blanchenay <i>v.</i>	iv.	707	Carpue <i>v.</i> London and Bright- ton Railway Company	v.	747
——— Magnay <i>v.</i> In er- ror	v.	381	Carr, Doe dem. Whitty <i>v.</i>	xvi.	117
Burton, Doe dem. Bird <i>v.</i>	xvi.	807	——— Ex parte	iii.	447
——— Driver <i>v.</i>	xvii.	989	——— <i>v.</i> Foster	iii.	581
Bury <i>v.</i> Blogg	xii.	877	——— <i>v.</i> Smith	v.	128
Bushell <i>v.</i> Wheeler note (a)	xv.	442	Carratt <i>v.</i> Morley	i.	18
Butcher, Barber <i>v.</i>	viii.	863	Carruthers <i>v.</i> West	xi.	143
——— Doe d. Lord Grant- ley <i>v.</i> note (b)	vi.	115	Carter, Doe dem. Goody <i>v.</i>	ix.	863
Butler and Masters, Re	xiii.	341	——— Jones <i>v.</i>	viii.	134
Button, Regina <i>v.</i>	xi.	929	——— <i>v.</i> Price	vii.	838
Bynner <i>v.</i> The Queen. In Error	ix.	523			
——— Regina <i>v.</i> note (a)	ix.	529			
Byron, Regina <i>v.</i>	xii.	321			

REPORTED IN THE NEW SERIES.

[7]

	Vol.	Page		Vol.	Page
Cartworth, Inhabitants of, Regina v.	v.	201	Chawner v. Cummings	viii.	311
Carus Wilson's Case	vii.	984	Chawton, Inhabitants of, Regina v.	i.	247
Cary, Davis v.	xv.	418	Chedgrave, Inhabitants of, Regina v.	xii.	206
Castelli v. Groom	xviii.	490	Cheek, Regina v.	ix.	942
Casterton, Inhabitants of, Regina v.	vi.	507	Chelmsford, Churchwardens of, Regina v.	v.	66
Castrique v. Bernabo	vi.	498	Chelsea Waterworks Company v. Bowley	xvii.	358
Cater v. Chignell	xv.	217	Cheltenham, Commissioners for Paving, Regina v.	i.	467
Catomore, Doe d. Tatum v.	xvi.	745	——— and Great Western Union Railway Company v. Daniel	ii.	281
Catterall, Inhabitants of, Regina v.	v.	901	Chester, Dean and Chapter of, Regina v.	xv.	513
——— v. Kenyon	iii.	310	Chichester, Regina v. note (c)	xvii.	504
Caudle v. Seymour	i.	889	Chignell, Cater v.	xv.	217
Caudwell, Regina v.	xvii.	503	Chilton, Regina v.	xv.	220
Caulfield, Hayes v.	v.	81	Chiswick, Inhabitants of, Regina v. note (a)	x.	241
Cazenove, Cork and Bandon Railway Company v.	x.	935	Chodwick, Spence v.	x.	517
Chabot v. Lord Morpeth	xv.	446	Chorley, Regina v.	xii.	515
Chadwick, Regina v.	xi.	173	Chrismas, Standen v.	x.	135
Chaffers, Linnet v.	iv.	762	Christchurch, Inhabitants of, Regina v.	xii.	149
Challis, Doe v.	xvii.	166	Christopherson v. Bare	xi.	473
——— Doe dem. Evers et ux. v.	xviii.	224	Churchill v. Bertrand	iii.	568
——— v. —— In Error			Clare Hall, Young v.	xvii.	529
Error	xviii.	231	Clarence Railway Company v. Great North of England Railway Company	iv.	46
——— Mullett v.	xvi.	239	Clark, Collier v. note (b)	v.	467
Chamberlayne, Biddulph v.	xvii.	361	——— Kemp v., In Error	xii.	647
Chambers, Williams v.	x.	337	——— Regina v.	v.	887
Chamney, Dawson v.	v.	164	——— Ryan v.	xiv.	65
Chaney v. Payne	i.	712	Clarke, Davies v.	vi.	16
Chaplin, Coates v.	iii.	483	——— Doe dem. Wood v.	vii.	211
Chaplin, Pearce v.	ix.	802	——— In re	ii.	619
Chapman v. Beckinton	iii.	703	——— Jones v.	iii.	194
——— v. Beecham	iii.	723	——— v. Leicestershire and Northamptonshire Canal Company	vi.	898
——— Conant v.	ii.	771	Regina v.	vi.	349
——— Greville v.	v.	731	Tinker v.	x.	604
——— v. Healop	xii.	928	Clay, Fellowes v.	iv.	313
——— v. Lane. In Error			——— Taylor v.	ix.	713
(11 A. & E. 980) v. Rawson	ii.	63	Clayards v. Dethick	xii.	439
——— v. Speller	viii.	373	Clayton v. Corby	ii.	813
——— Wray v.	xiv.	621	——— v.	v.	415
Chard v. Fox	xiv.	742	——— Elliott v.	xvi.	581
Charlbury and Walcot, Inhabitants of, Regina v.	xiv.	200	——— Regina v.	xiii.	354
Charlemont, Earl, Watson v.	iii.	378	Clayworth, Ferguson v.	vi.	269
Charlesworth v. Ellis	xii.	856	Clegg, Brown v.	xvi.	681
——— Regina v.	vii.	678	——— v. Dearden	xii.	576
Charleton v. Spencer	xvi.	1012			
Charrette, Regina v.	iii.	693			
Charter v. Greame	xiii.	447			
Chasen, Richardson v.	xiii.	216			
Chatfield v. Cox	xviii.	756			
Chatham, Inhabitants of, Regina v.	xviii.	321			
	xii.	300			

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Clements, Ringham <i>v.</i>	xii.	260	Connop <i>v.</i> Levy	xi.	769
— Walker <i>v.</i>	xv.	1046	— Lord G. Bentinck <i>v.</i>	v.	693
Clemson, Taylor <i>v.</i> In Error	ii.	978	— Wood <i>v.</i>	v.	292
— <i>v.</i>	ii.	835	Constable, Aldred <i>v.</i>	iv.	674
Clench, Smith <i>v.</i>	i.	522	— <i>v.</i>	vi.	370
Clifton, Harden <i>v.</i>	vi.	468	Newton <i>v.</i>	ii.	157
— Hooper	i.	698	Contant <i>v.</i> Chapman	iii.	771
— Ross <i>v.</i> (11 A. & E. 631)	viii.	524	Conyers, Regina <i>v.</i>	viii.	981
— Slack <i>v.</i>	iv.	606	Cooch <i>v.</i> Goodman	ii.	580
Clinch, Grace <i>v.</i>			Cook <i>v.</i> Field	xv.	460
Clint, Inhabitants of, Regina <i>v.</i> (11 A. & E. 624, note (b))	i.	886	— In re	vii.	653
Clipperton, Re	xii.	687	— <i>v.</i> McPherson. In Error	viii.	1030
Clipsham <i>v.</i> Vertue	v.	265	— <i>v.</i> Pearce. In Error	viii.	1044
Clough, Spilsbury <i>v.</i>	ii.	466	Cooke <i>v.</i> Cunliffe	xvii.	245
Clue, Martyn <i>v.</i>	xviii.	661	— Ostler <i>v.</i>	xiii.	143
Coates <i>v.</i> Birch	ii.	252	— <i>v.</i> Ostler. In Error	xviii.	831
— Chaplin	iii.	483	— <i>v.</i> Tonkin	ix.	936
— Huggins <i>v.</i>	v.	432	Cookson, Foster <i>v.</i>	i.	419
Cobb, Allan <i>v.</i>	x.	683	Cooling <i>v.</i> Great Northern Railway Company	xv.	486
— Becke	vi.	930	Coombs, Doe dem. Fryer <i>v.</i> Warwick <i>v.</i>	iii.	687
— Hankey <i>v.</i>	i.	490	Cooper <i>v.</i> Blick	ii.	915
Cobbett, Ex parte note (h)	xv.	181	— Downs <i>v.</i>	ii.	256
— <i>v.</i> Hudson. In Error	xiii.	497	Cooper, Edwards <i>v.</i>	xi.	33
— <i>v.</i>	xv.	988	— Foy <i>v.</i>	ii.	937
Cobbett's Case	vii.	187	— <i>v.</i> Harding	vii.	928
Cockburn, Sir G., Regina <i>v.</i>	xvi.	480	— Regina <i>v.</i>	viii.	533
Cocker <i>v.</i> Musgrove	ix.	223	— Spicer <i>v.</i>	i.	424
Colchester, Mayor of, <i>v.</i> Brooke	vii.	339	Copper Miners' Company <i>v.</i> Fox	xvi.	229
Colerne, Inhabitants of, Regina <i>v.</i>	xi.	909	Corbett, Jones <i>v.</i>	ii.	828
Coles, Regina <i>v.</i>	viii.	75	— Schofield <i>v.</i>	xi.	779
— <i>v.</i> Strick	xv.	2	Corby, Clayton <i>v.</i>	ii.	813
Collett <i>v.</i> Curling	x.	785	— <i>v.</i>	v.	415
— London and North Western Railway Company	xvi.	984	Corfield, Curlewis <i>v.</i>	i.	814
Collier <i>v.</i> Clarke note (b)	v.	467	Cork and Bandon Railway Company <i>v.</i> Caze-	x.	935
— Melhuish <i>v.</i>	xv.	878	nove		
Colling, Regina <i>v.</i>	xvii.	816	Corn Exchange, Winches-		
Collingwood, Regina <i>v.</i>	xii.	681	ter, Proprietors of, <i>v.</i> Gil-		
Collins <i>v.</i> Bayntun	i.	117	lingham		
— Crouch	xiii.	542	Cornwall, Justices of, Re-	iv.	475
— Evans <i>v.</i>	v.	804	gina <i>v.</i> note (a) v.	9	
— <i>v.</i> In Error	v.	820	Corsar <i>v.</i> Reed. In Error	xvii.	540
Collins <i>v.</i> Stone	iv.	655	Cort <i>v.</i> Ambergate, Notting-		
Colls, Pemberton <i>v.</i>	x.	461	ham, Boston and Eastern		
Colneis Union, Guardians of, Woodbridge Union, Guar-	xiii.	269	Junction Railway Co.	xvii.	127
— dians of, <i>v.</i>	xiii.	128	Costerton, Palmer <i>v.</i>	iv.	525
Colombine <i>v.</i> Penhall	xiii.	179	Cottle, Regina <i>v.</i>	xvi.	412
Combe, Regina <i>v.</i>			Cotton, Sir St. V., Regina <i>v.</i>	xv.	569
			Cottrell, Garrard <i>v.</i>	x.	679
			Coupland, Hoare <i>v.</i>	xiv.	552
			Courtenay, Doe dem. Earl of Egremont <i>v.</i>	xi.	702

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Day, Doe dem. Parsley v.	ii.	147	Dobson, Regina v.	vi.	637
— v. Paupierre	xiii.	802	— — v.	ix.	302
— v. Smith	xv.	584	Doddington, Inhabitants of,	i.	411
Dax, Bland v.	viii.	126	Regina v.	xvii.	166
Dean, Regina v.	ii.	731	Doe v. Challis		
Deane, Regina v.	ii.	96	Doe dem. France v. An-		
Dearden, Clegg v.	xii.	576	drews	xv.	756
Death, Ex parte	xviii.	647	— Angell v. Angell	ix.	328
De Bernardy v. Spalding	iv.	823	— Renow v. Ashley	x.	668
De Bode, Baron, Case of	viii.	208	— Carter v. Barnard	xiii.	945
— v. The Queen.			— Bowley v. Barnes	viii.	1037
In Error	xiii.	364	— Pennington v. Bar-		
D'Ebro v. Schmidt	xiii.	653	rell	x.	531
Deere v. Ivey	iv.	379	— Brayne v. Bather	xii.	941
De Haber v. The Queen of	xvii.	171	— Earl Spencer v.		
Portugal	v.	896	Beckett	iv.	601
Deighton, Regina v.	ix.	869	— Edney v. Benham	vii.	976
De la Crouée, Blanchard v.	xv.	1081	— v. Billett	vii.	976
Deller v. Prickett	i.	383	Birmingham Canal		
Delisser v. Towne	x.	{ 152	Company v. Bold	xi.	127
De Medina v. Grove	x.	{ 172	— Robinson v. Bous-		
De Medina, Stephens v.	iv.	422	field	vi.	492
Denham, Horner v. note (c)	xii.	813	— Drake v. Bowditch	viii.	973
Dent, Millen v.	x.	846	— Nicoll v. Bower	xvi.	805
— Tithe Commutation,	viii.	43	— Pye v. Bramwell	iii.	307
Re	xviii.	761	— Lord Egremont v.		
Denton, Inhabitants of, Re-			Burroughs	vi.	229
gina v.			— Bord v. Burton	xvi.	807
De Porquet v. Page	xv.	1073	— Lord Grantley v.		
Depperman v. Hubbersty	xvii.	766	Butcher	note (b) vi.	115
Derbyshire, Inhabitants of,	ii.	745	— Wyndham v. Carew	ii.	317
Regina v.	vii.	193	— Campton v. Car-		
Justices of, Re-			penter	xvi.	181
gina v.			— Whitty v. Carr	xvi.	117
De Richemont, Walter v.	vi.	544	— Goody v. Carter	ix.	863
Derry, Peirce v.	iv.	635	— Tatum v. Cstomore	xvi.	745
Dethick, Clayards v.	xii.	439	— Evers et Ux. v.		
Dewar v. Swabey (11 A.	v.	602	Challis	xviii.	224
g. E. 913)	ii.	71	— Challis v.		
Dewey, Emden v.	xvi.	804	In Error	xviii.	231
Dibbin, Hinton v.	ii.	646	— Wood v. Clarke	vii.	211
Dickinson v. Eyre note (a)	vii.	307	— Warwick v. Coombes	vi.	535
— Smith v.	v.		— Fryer v. Coombs	iii.	687
Dimes v. Grand Junction	ix.	469	— Earl of Egremont		
Canal Company	xv.	276	v. Courtenay	xi.	702
— v. Petley	xiv.	564	— Bastow v. Cox	xi.	122
Dimes's Case	vi.	452	— Cozens v. Cozens	i.	426
Directions to Taxing Offi-	viii.	629	— Cross v. Cross	viii.	714
cers	vii.	892	— Merigan v. Daly	viii.	934
Dixie, Wood v.	xv.	33	— Earl of Egremont		
Dixon, Regina v.	i.	806	v. Date	iii.	609
Dobell, Doe dem. Robinson v.	ix.	991	— Davis v. Davies	i.	430
Dobson v. Blackmore	vi.	637	— v. —	ix.	648
— v. Groves			— v. —	xvi.	951
			— Jenkins v. Davis	x.	314
			— Parsley v. Day	ii.	147

REPORTED IN THE NEW SERIES.

[11]

	Vol.	Page		Vol.	Page
Doe dem. Robinson v. Dobell	i.	806	Doe dem. Plumer v. Mainby	x.	473
— Richards v. Evans	x.	476	— Baddeley v. Mas-		
— Palmer v. Eyre	xvii.	366	sey	xvii.	373
— Earl of Egremont			— Ashburnham, Earl		
v. Forwood	iii.	627	of, v. Michael	xvi.	620
— Lord Arundel v.			— v. —	xvii.	276
Fowler	xiv.	700	— Millet v. Millet	xi.	1036
— Monk v. Geekie	v.	841	— Davenish v. Moffatt	xv.	257
— Hartridge v. Gil-			— Dayman v. Moore	ix.	555
bert	v.	423	— Mayor of Rich-		
— Muston v. Gladwin	vi.	953	mond v. Morphett	vii.	577
— Morrison v. Glover	xv.	103	— Wingrove v. Ni-		
— Lyster v. Goldwin	ii.	143	choll	xiii.	126
— Wilkinson v. Goo-			— Armistead v. North		
dier	x.	957	Staffordshire Railway		
— Lansdell v. Gower	xvii.	589	Company	xvi.	526
— King v. Grafton	xviii.	496	— Evans v. Page	v.	767
— Dimes v. Grand			— Shallcross v. Palmer	xvi.	747
Junction Canal Company			— Bedford Charity v.		
note (a)	ix.	518	Payne	vii.	287
— Earl of Egremont			— Walton v. Penfold	iii.	757
v. Grazebrook	iv.	406	— Blewett v. Phillips	i.	84
— Groves v. Groves	x.	486	— Jacobs v. Phillips	viii.	168
— Crawley v. Gutte-			— v. —	x.	180
ridge	xi.	409	— Payne v. Plyer	xiv.	512
— Riddell v. Gwynnell	i.	682	— Biddulph v. Poole	xi.	712
— Bennett v. Hale	xv.	171	— Woodhouse v.		
— Campbell v. Ha-			Powell	viii.	576
milton	xiii.	977	— Earl of Egremont		
— Le Keux v. Har-			v. Pulman	iii.	622
rison	vi.	631	— Parr v. Roe	i.	700
— Graham v. Haw-			— Hudson v. Roe	xviii.	806
kins	ii.	212	— Patrick v. Royle	xiii.	100
— Biddulph v. Hole	xv.	848	— Marquis of An-		
— Banks v. Holmes	xii.	951	glesey v. Rugely, Church-		
— Bills v. Hopkinson	v.	223	wardens and Overseers		
— Levy v. Horne	iii.	757	of		
— Hubbard v. Hub-			— Newman v. Rush-	vi.	107
bard	xv.	227	ham		
— Mence v. Hadley	xvii.	571	— Myatt v. St. He-	xvii.	723
— Clay v. Jones	xiii.	774	len's Railway Company	ii.	364
— Earl of Shrews-			— Blayney v. Savage	iv.	416
bury v. Keeling	xi.	884	— Molesworth v.		
— Gardner v. Ken-			Sleeman	ix.	298
nard	xii.	244	— Clarke v. Sma-		
— Butler v. Lord			ridge	vii.	957
Kensington	viii.	429	— Fleming v. Somer-		
— Lord Egremont v.			ton	vii.	58
Langdon	xii.	711	— Timmis v. Steele	iv.	663
— Draper v. Lawley			— Lord Egremont v.		
note	xiii.	954	Stephens	vi.	208
— Lean v. Lean	i.	229	— Bayer v. Strickland	ii.	792
— Hudson v. Leeds			— Pennington v. Tan-		
and Bradford Railway	xvi.	796	niere	xiii.	998
Company			— Howe v. Taunton		
— Buddle v. Lines	xi.	402	note (b)	xvi.	117

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Doe dem. Harris v. Taylor	x.	718	Dulwich College, Regina v.	xvii.	600
——— Dand v. Thompson	vii.	897	Duncan v. Louch	vi.	904
——— v. —————	xiii.	670	Dundalk Western Railway Company v. Tapster	i.	667
——— Lord Downe v. Thompson	ix.	1037	Dunford, Winsor v.	xii.	603
——— Snell v. Tom	iv.	615	Dunn, Regina v.	v.	969
——— Tresidder v. Tresidder	i.	416	——— Richardson v.	ii.	218
——— Darlington v. Ulph	xiii.	204	——— v. Sayles	v.	685
——— Evans v. Walker	xv.	28	——— Stackwood v.	iii.	822
——— Evers v. Ward	xviii.	197	——— The Queen v.	xii.	1026
——— Priest v. Weston	ii.	249	——— v. ————— In Error	xii.	1031
——— Marlow v. Wiggins	iv.	367	——— Wilton v.	xvii.	294
——— Lord Egremont v. Williams	vii.	686	Dunraven, Lord, v. Llewellyn. In Error	xv.	791
——— v. —————	xii.	688	Durham and Sunderland Railway Company v. Walker. In Error	ii.	940
——— The Queen v. York, Archbishop of	xiv.	81	Dyer, Regina v.	xiii.	851
——— Hopley v. Young	viii.	63	Dyke, Richards v.	iii.	256
Dolby, Remington v.	ix.	176	Dyson, Hall v.	xvii.	785
——— v. Remington	ix.	179	——— Markwell v.	xiv.	820
Done, Hughes v.	i.	294	E.		
Donovan, Huntley v.	xv.	96	Eades v. Booth	viii.	718
Dornford, Ford v.	viii.	583	Eadon v. Branson	ix.	579
Doughty v. Bowman	xi.	444	Eales, Green v.	ii.	225
Douglas, Regina v.	xiii.	42	Ealing, Inhabitants of, Regina v. note (a)	xii.	178
——— v. The Queen. In Error	xiii.	74	Earp v. Satchell	iv.	121
——— In re	iii.	825	Eason v. Henderson	xii.	986
Dover and Deal Railway Company, Macgregor v.	xviii.	618	——— v., In Error	xvii.	701
Dover, Mayor of, Regina v.	xi.	260	East Ardsley, Inhabitants of, Regina v.	xiv.	793
——— Regina v., In Error	xi.	277	Eastern Counties Railway Company, Regina v.	ii.	{ 347 569
Dowdall, Hallett v.	xviii.	2	East India Company, Gregory v.	vii.	199
Downe, Lord, v. Thompson	ix.	1037	East Lancashire Railway Company, Regina v.	ix.	980
Downey, Regina v.	vii.	281	East London Waterworks Company v. Mile End Old Town, Trustees of	xvii.	512
Downman, Jones v., note (a)	iv.	235	——— Proprietors of, Regina v.	xviii.	705
——— Williams v.	vii.	112	East Mark, Inhabitants of, Regina v.	xi.	877
——— v. ————— In Error	vii.	103	East Rainton, Inhabitants of, Regina v. note (a)	xi.	62
Downs v. Cooper	ii.	256	East Stonehouse, Inhabitants of, Regina v.	x.	230
Drake, Musgrave v.	v.	185	——— v.	xii.	72
Dresser and Marshall, In re	iii.	878			
Driscoll v. Whalley	xvii.	948			
Driver v. Burton	xvii.	989			
——— Rogers v.	xvi.	102			
Drummond v. Tillington	xvi.	740			
Dudfield, Edan v.	i.	302			
Dufaur, Sayer v.	ix.	800			
——— v.	xii.	325			
Duff, Gregory v.	xiii.	608			
Dukinfield, Inhabitants of, Regina v.	xi.	678			

REPORTED IN THE NEW SERIES.

[13]

	Vol.	Page		Vol.	Page
East Ville, Inhabitants of, Regina v.	i.	828	Evans, Sewell v.	iv.	626
Eaton v. Swansea Water- works Company	xvii.	267	Evenwood Barony, Inhabit- ants of, Regina v.	iii.	370
Evans r. Rees	ii.	334	Everard v. Poppleton	v.	181
Ecclesall Bierlow, Regina v. Inhabitants of (11 A. & <i>E. 607)</i>	i.	698	Everist, Regina v.	x.	178
Edan v. Duffield	i.	302	Evershed, Kine v.	x.	143
Eden, Wilson v.	xiv.	256	Ewer v. Jones	ix.	623
Edgcombe, Greenfell v.	xviii.	474	Excise Commissioners of, Regina v.	vi.	975
Edmunds v. Pinniger	vii.	558	Exeter, Bishop of, Gorham v.	xv.	52
Edmundson, In re	xvii.	678	—— Mayor of, v. Warren	v.	773
Edwards v. Banbury	iii.	885	—— Recorder of, Regina v.	v.	342
—— v. Cooper	xi.	33	Ex parte Ackworth, Over- seers of note (a)	iii.	397
—— v. Martyn	xvii.	693	——— Bateman	vi.	853
Edye, Regina v.	xii.	936	——— Bartlett	xii.	488
Egremont, Earl of, Doe dem., v. Courtenay	xi.	702	——— Bessett	vi.	481
———, Earl of, Philipson v.	vi.	587	——— Carr	iii.	447
——— v. Wil- liams	xi.	688	——— Cobbett	xv.	181
Eiffe, Lamond v.	iii.	910	——— Dauncey	iv.	668
Eisenberg, Brough v.	xiv.	446	——— Davies	v.	564
Elgie, Green v.	v.	99	——— Death	xviii.	647
Ellel, Inhabitants of, Re- gina v.	vii.	593	——— Evans	ix.	279
Ellesmere, Inhabitants of, Regina v.	xiii.	19	——— Hall	note (g) vi.	531
Elliot v. Clayton	xvi.	581	——— Hopwood	xv.	121
——— v. Von Glehn	xiii.	632	——— Marlborough, Duke		
Ellis v. Abrahams	viii.	709	of	v.	955
—— Charlesworth v.	vii.	678	——— Napier	xviii.	692
—— Regina v.	vi.	501	——— Nash	xv.	92
—— v. Russell	x.	952	——— Partington	vi.	649
Elliston v. Berryman	xv.	205	—— Phillips (2 E. & B. 192)	xviii.	890
Elsley, Regina v.	xv.	1025	——— Pontefract, Over- seers of	iii.	391
Elvin, Harrison v.	iii.	117	——— Ramshay	xviii.	173
Elwin, Lilley v.	xi.	742	——— Rayne	i.	982
Elwood v. Bullock	vi.	383	——— Rose, D.D.	xviii.	751
Ely (Isle), Inhabitants of, Regina v.	xv.	827	——— Stanford	i.	886
Emden, Dewey v.	xvi.	804	——— Thompson	vi.	721
Emery v. Corporation of Malmesbury	iii.	577	——— Tollerton	iii.	792
Emmerson, Musgrave v.	x.	326	——— Wellingborough, Inhabitants of	viii.	123
Eton College, Regina v.	viii.	526	——— Young	xiii.	662
Evans, Bonaker v.	xvi.	162	Eyles, Scadding v.	ix.	858
—— v. Collins	v.	804	Eynsham Case	note (a) xii.	398
——— In Error	v.	820	Eyre, Dickenson v.	note (a) vii.	307
——— Doe dem. Richards v.	x.	476	—— Doe dem. Palmer v.	xvii.	366
——— Ex parte	ix.	279	F.		
——— v. Gwyn	v.	844	Faith, Knight v.	xv.	649
——— v. Harlow	v.	624	Faithful v. Ashley	i.	183
——— Regina v.	note (b) i.	355	Falcon v. Benn	ii.	314
			Falk, Crow v.	viii.	467
			Fall, Regina v.	i.	636

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Fall, Regina v. In Error	i.	653	Forster v. Hoggart	xv.	155
Fancourt v. Thorne	ix.	312	Forth v. Simpson	xiii.	680
Fannin v. Anderson	vii.	811	Forsyth, Harden v.	i.	177
Farlow, Alfred v.	viii.	854	Forwood, Doe dem. Earl of Egremont v.	iii.	627
Farrar, Stonewhewer v.	vi.	730	Foster v. Bank of England	vi.	878
Farrer, Crowther v.	xv.	677	— v. —————	viii.	689
Farrow v. Mayes	xviii.	516	— Carr v.	iii.	581
Faulkner, Johnson v.	ii.	925	— v. Tattersall note (a)	iii.	212
Fawcett v. Fearne	vi.	20	Fouch, Regina v.	ii.	308
— v. York and North Midland Railway Company	xvi.	610	Fountain v. Boode	iii.	5
Fearne, Fawcett v.	vi.	20	Fowler, Doe d. Lord Arundel v.	xiv.	700
Fearnley, Hall v.	iii.	919	Fox, Chard v.	xiv.	200
Fellowes v. Clay	iv.	313	— Copper Miners' Company v.	xvi.	229
Fennell, Robbins v.	xi.	248	— Regina v.	ii.	246
Fenton, Regina v.	i.	480	Foy v. Cooper	ii.	937
Fenwick v. Laycock	i.	414	Francis, Regina v.	xviii.	526
— v.	ii.	108	— v. Steward	v.	984
Ferguson v. Clayworth	vi.	269	Frankis, Merchant v.	iii.	1
Ferrand v. Milligan	vii.	730	Franklyn, Lovelock v.	viii.	371
Field, Cook v.	xv.	460	Fredericks, Thomas v.	x.	775
— Gatty v.	ix.	431	Freeman v. Birch note (a)	iii.	492
— Toppin v.	iv.	386	— v. Rosher	xiii.	780
Fife v. Bousfield	vi.	100	— v. Steggall	xiv.	202
Filliter v. Phippard	xi.	347	— Wintle v. (11 A. § E. 539)	i.	439
Findon v. McLaren	vi.	891	Friar v. Grey	xv.	891
Finney v. Beesley	xvii.	86	— Grey v.	xv.	901
Fisher v. Birrell	ii.	239	Frost v. Daniel	iv.	880
— v. Waltham	iv.	889	— v. Lloyd	ix.	130
Fitzball v. Brooke	vi.	873	Fryer, Allum v.	iii.	442
Fitzgerald, Agricultural Cattle Insurance Company v.	xvi.	432	Fullarton, Mittleholzer v.	vi.	989
Fitzhowe, Perry v.	viii.	757	— v. ————— In error	vi.	1022
Fitzroy, Linford v.	xiii.	240	Fuller v. Wilson	iii.	58
Flather v. Stubbs	ii.	614	— Wilson v.	iii.	{ 68
Fletcher v. Calthrop	vi.	880	Furze v. Sharwood	ii.	388
— Regina v. (2 E. § B. 279)	xviii.	502	Fyson, Malden v.	xi.	292
Flewker, Re note (a)	xvii.	572			
Flight v. Leman	iv.	883			
Flokton v. Hall	xiv.	380			
— Hall v. In Error	xvi.	1039			
Inhabitants of, Regina v.	ii.	535			
Foley v. Addenbrooke	iv.	197			
Fontaine Moreau, Regina v.	xi.	1028	G.		
Force, Falk v.	xii.	666	Gabriel v. Smith	xvi.	847
Ford v. Beech	xi.	842	Gage v. Newmarket Railway Company	xviii.	457
— v. In Error	xi.	852	Gale v. Burnell	vii.	850
— v. Dornford	viii.	583	— v. Lewis	ix.	730
Fornecott, St. Mary, Inhabitants of, Regina v.	xii.	160	Gant, Bastow v.	xiii.	807
Forrest, Pollitt v.	xi.	939	Garbett, Skilbeck v.	vii.	846
— v. In Error	xi.	962	— v. Veale	v.	408
Forster v. Cookson	i.	419	Gardiner, Braithwaite v.	viii.	473

REPORTED IN THE NEW SERIES.

[15]

	Vol.	Page		Vol.	Page
Gardner, Crosthwaite v.	xviii.	640	Goldsworthy, Smith v.	iv.	490
— v. M'Mahon	iii.	561	Goldwin, Doe dem. Lyster v.	ii.	143
Gardner v. Slade	xiii.	796	Gomersal, Inhabitants of, Regina v.	xii.	76
Garland, Hemp v.	iv.	519	Gompertz, Daniels v.	iii.	322
Garrard, Cotterell v.	x.	679	— Regina v.	ix.	824
Garton, University College v.	x.	760	Goodall v. Lowndes	vi.	464
Gaskell, Regina v.	xvi.	472	— Massey v.	xvii.	310
Gaskill v. Skene	xiv.	664	Goodered v. Armour	iii.	956
Gaston, Wilkinson v.	ix.	137	Goodier, Doe d. Wilkinson v.	x.	957
Gatty v. Field	ix.	431	Goodman, Cooch v.	ii.	580
Gavin, Wolton v.	xvi.	48	v. Pocock	xv.	576
Gee v. Manchester, Mayor, &c. of,	xvii.	737	Goodwin v. Cremer	xviii.	757
Geekie, Doe dem. Monck v.	v.	841	— Lane v.	iv.	361
Gent v. Cutts	xi.	288	Goole, Inhabitants of, Regina v.	xii.	172
Stonehouse v. note (a)	ii.	431	Gordon, Hoggins v.	iii.	466
Gething, Bevan v.	iii.	740	v. Laurie	ix.	60
Gibbins, Packer v.	i.	421	Gorham v. Bishop of Exeter	xv.	52
— Timmins v.	xviii.	722	Gosling v. Voley	vii.	406
— Torrence v.	v.	297	— v. — In Error	xii.	328
Gibbon, Kempe v.	ix.	609	Gosset, Howard v.	x.	359
— v.	xii.	662	— v.	x.	411
Gibbs v. Whatley	v.	396	Gower, Doe d. Lansdell v.	xvii.	589
Gibson, Addison v.	x.	106	Grace v. Clinch	iv.	606
— v. Ireson	iii.	39	Gracie, Daniel r.	vi.	145
— v. Kirk	i.	850	— Graham v.	xiii.	548
— Small v.	xvi.	128	Grafton, Doe dem. King v.	xviii.	496
— v. In Error	xvi.	141	Graham, Bosanquet v. n. (b)	vi.	601
Gilberdike, Inhabitants of, Regina v.	v.	207	— v. Gracie	xiii.	548
Gilbert, Doe d. Hartridge v.	v.	423	— v. Jackson	vi.	811
Gifford v. Whittaker	vi.	249	— London Grand Junction Railway Company v.	i.	271
Giles v. Giles	ix.	164	— v. Lynes	vii.	491
— v. Groves	xii.	721	— v. Witherby	vii.	491
Gillet v. Whitmarsh	vii.	966	Grand Junction Canal Company, Dimes v.	ix.	469
Gillingham, Corn Exchange, Winchester, Proprietors of, v.	iv.	475	Doe dem. Dimes v. note (a)	ix.	518
Gillyard, Regina v.	xii.	527	Re-		
Gittins, Meredith v.	xviii.	257	gina v.	iv.	18
Gladwin, Doe d. Muston v.	vi.	953	Re-		
Glamorganshire, Justices of, Regina v.	xiii.	561	gina v.	v.	1006
Glave v. Wentworth note (b)	vi.	173	Grange v. Trickett (2 E. & B. 395)	xvii.	574
Glenn, Brown, v.	xvi.	254	Grant, Milbanke v.	iii.	690
Glossop, Inhabitants of, Regina v.	xii.	117	Regina v.	xiv.	43
Gloucester, Mayor of, Regina v.	v.	862	Granville, Earl of, Hilton v.	v.	701
Glover, Doe dem. Morison v.	xx.	103	Gratrex, Prickett v.	viii.	1020
— v. North Staffordshire Railway Company	xvi.	912	Grazebrook, Doe dem. Earl of Egremont v.	iv.	406
Glyn, Soares v.	viii.	24	— Rogers v.	viii.	895
Goddard v. Ingram	iii.	439	Greame, Charter, v.	xiii.	216
Goldsworthy, Smith v.	ii.	717	Great Bolton, Inhabitants of, Regina v.	vii.	387

Vol.	Page	Vol.	Page
Great Northern Railway Company, Abraham v.	xvi. 586	Gregson v. Ruck .	iv. 737
Cooling v.	xv. 486	Grenfell v. Edgcombe .	vii. 661
Lawrence v.	xvi. 643	Greville v. Chapman .	v. 731
Regina v.	xiv. 25	— v. Stultz, In Error .	xi. 997
Salisbury, Marquis of, v.	xvii. 840	Grey, Friar v. .	xv. 891
Watkins v.	xvi. 961	— v. — In Error .	xv. 901
Great North of England Railway Company, Clarence Railway Company v.	iv. 46	Gridley v. Austen .	xvi. 504
Paxton v.	viii. 938	Griffin, Regina v. .	ix. 155
Regina v.	ix. 315	Griffiths, Hyatt v. .	xvii. 505
Great Western Railway Company, Kennet and Avon Canal Company v.	xiii. 327	— v. Lewis .	vii. 61
Burnham Rates, Regina v.	iii. 333	— v. .	viii. 841
Regina v.	v. 597	— — — Regina v. .	xvii. 164
Regina v.	vi. 179	Grimsditch, Worthington v. .	vii. 479
Regina v.	xv. { 1083	Grimshaw, Regina v. .	x. 747
Rouch v.	51	Groom, Castelli v. .	xviii. 490
Tilehurst .	xv. 1085	Grove, De Medina v. .	x. 152
Green v. Eales .	ii. 225	— v. .	x. 172
— v. Elgie .	v. 99	Hazeldine v. .	iii. 997
— Samuel v. .	x. 262	Groves, Dobson v. .	vi. 687
— v. Smithies .	i. 796	— Doe dem. Groves v. .	x. 486
— v. Steer .	i. 707	— Giles v. .	xii. 721
— v. Wood .	vii. 178	Gummow, Belcher v. .	ix. 873
Greenacre, Wrightup v. .	x. 1	Gunston, London Grand Junction Railway Company v. .	i. 271
Greenaway, Regina v. .	vii. 126	Gurdon, Jones v. .	ii. 600
Greene, Regina v. .	ii. 460	Gutteridge, Doe dem. Cawley v. .	x. 409
— v. .	iv. 646	Gwynnell, Doe dem. Riddell v. .	i. 682
Greenhill, Baker v. .	xvii. 793	Gwyn, Evans v. .	v. 844
Greenough, Apothecaries' Company v. .	iii. 148		
Gregory, Dawson v. .	i. 799		
Duff v. .	vii. 756		
— v. East India Company	xiii. 608		
Regina v. .	vii. 199		
— v. .	vii. 274		
— v. The Queen, In Error	xv. { 957		
	974		
		H.	
		Haddrick v. Heslop .	xiii. 267
		Hadley, Doe dem. Mence v. .	xvii. 571
		Haines, Bailey v. .	xiii. 815
		— v. .	xv. 533
		Hale, Doe dem. Bennett v. .	xv. 171
		Hatch v. .	xv. 10
		Haley, Armitage v. .	iv. 917
		Halford v. Cameron's Coal-brook, &c., Railway Company .	xvi. 442
		Halifax, Inhabitants of, Regina v. .	xii. 111
		— Road Trustees, Regina v. .	xii. 448
		Halket v. Merchant Traders' Insurance Company .	xiii. 960
		Hall v. Bainbridge .	xii. 699
		— v. .	v. 233
		— Bowdon v. .	iv. 840
		— Brunton v. .	i. 792
		— v. Dyson .	xvii. 785

REPORTED IN THE NEW SERIES.

[17]

	Vol.	Page		Vol.	Page
Hall, Ex parte note (g)	vi.	531	Harrogate, Commissioners of,		
— v. Fearnley	iii.	919	Regina v.	xv.	1012
— Flockton v.	xiv.	380	Harrold v. Whitaker	xi.	147
— v. — In Error	xvi.	1039	— v., In Er-		
— v. Mayor, &c., of	v.	526	ror	xi.	163
Swansea			Harrow or the Hill, Inhabit-		
Hallack v. Cambridge Uni-	i.	593	ants of, Regina v.	xii.	103
versity			Hart v. Stephens	vi.	937
Hallett v. Dowdall	xviii.	23	Hartfield, Overseers of, v.		
Halstead v. Skelton, In			Rotherfield, Overseers of	xvii.	746
Error	v.	86	Hartley v. Manton	v.	247
Hamelin v. Bruck	ix.	306	— v. Moxham	iii.	701
Hamilton, Doe dem. Camp-	xiii.	977	— Wintney Union,		
bell v.			Guardians of, Regina v.	i.	677
— v. The Queen, In	ix.	271	Hartpury, Regina v.	viii.	566
Error	xv.	187	Harvey, Pinches v.	i.	868
— Rankin v.			— Ralph v.	i.	845
Hammersmith Bridge Com-	xv.	369	— Regina v.	iii.	475
pany, Regina v.			— Richards v.	i.	845
Inhabitants			— v. Scott	xi.	92
of, Regina v.	xi.	391	Harwich, Mayor, &c., of,		
Hammond, Bendyshe v.	xiii.	869	Regina v.	ii.	909
— Regina v.	xvii.	772	Hasell, Craig v.	iv.	481
Hammond's Case	ix.	92	Haslam, Regina v.	xvii.	220
Hanbury, Pratt v.	xiv.	190	Hasleham v. Young	v.	833
Hance, Lewis v.	xi.	921	Hastings, Lord, Regina v.	vi.	141
Hankey v. Cobb	i.	490	Hatch v. Hale	xv.	10
Hankinson, Holford v.	v.	584	Hatchett, Page v.	viii.	593
Hannah, Hirst v.	xviii.	383	Hatfield Feverel, Inhabit-		
Harborne, Penniall v.	xi.	368	ants of, Regina v.	xiv.	298
Harden v. Clifton	i.	522	Hawdon, Regina v.	i.	464
— v. Forsyth	i.	177	Hawkins v. Benton	viii.	479
Hardey, Regina v.	xiv.	529	— Doe dem. Graham	ii.	212
Harding, Cooper v.	vii.	928	— Taylor v.	xvi.	308
Hare v. Hyde	xvi.	394	Hawksford, Robinson v.	ix.	52
Harland v. Binks	xv.	713	Haworth v. Ormerod	vi.	500
Harlock, Legge v.	xii.	1015	Hawthorn v. The Newcastle,		
Harlow, Evans v.	v.	624	&c., Railway Company		
Harman, Hope v. note (b)	xvi.	751	note (a)	iii.	734
Harmer, Duke of Bruns-			Hay v. Ayling	xvi.	423
wick v.			— Dawson v.	xiii.	815
— v.			Hayes v. Caulfield	v.	81
Harper v. Williams			— Stanley v.	iii.	105
Harris, Bailey v.	iv.	219	Haygarth, Wilkinson v.	xii.	837
— Cousins v.	xii.	905	— v. — In Er-		
— Darby v.	xii.	726	ror	xii.	851
— Lewis v.	i.	895	Hayne v. Rhodes	viii.	342
— Pargeter v.	xii.	724	Hayward, Allen v.	vii.	960
— v. Reynolds	vii.	708	— v. Hefer	v.	398
— Tew v.	vii.	71	Hazeldine v. Grove	iii.	997
Harrison, Doe dem. Le	xii.	7	Heage, Inhabitants of, Re-		
Keux v.	vi.	631	gina v.	ii.	128
— v. Elvin	iii.	117	Heanor, Inhabitants of, Re-		
— Prentice v.	iv.	852	gina v.	vi.	745
— Regina v.	ix.	794	Hearne v. Stowell (12 A. & E.		
— v. Turner	x.	482	727)	ii.	423
— Whitehead v.	vi.	423	Heath, Robbins v. note (e)	xi.	257

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Heath, Williamson <i>v.</i>	iv.	402	Hinton <i>v.</i> Dibbin	ii.	646
Hedley <i>v.</i> Bainbridge	iii.	316	Hirst <i>v.</i> Hannah	xvii.	383
Heffer, Hayward <i>v.</i>	v.	398	— Ray <i>v.</i>	ix.	584
Hellier, Regina <i>v.</i>	xvii.	229	Hoare <i>v.</i> Coupland	xiv.	552
Hemingway's Arbitration note	xv.	305	— <i>v.</i> Silverlock	xii.	624
Hemp <i>v.</i> Garland	iv.	519	Hodgkinson <i>v.</i> Wyatt	iv.	749
Henderson, Eason <i>v.</i>	xii.	986	Hodgson, Mallalieu <i>v.</i>	xvi.	689
— <i>v.</i> In Error	xvii.	701	— <i>v.</i> Repton, In Error	vii.	96
— <i>v.</i> Henderson	vi.	288	ror	— <i>v.</i> , In Error	
— <i>v.</i>	xi.	1015	ror		
— Roffey <i>v.</i>	xvii.	574	— Slater <i>v.</i>	vii.	84
— Simms <i>v.</i>	xi.	1015	Hodsman, Shepherd <i>v.</i>	xviii.	316
Hendon, Inhabitants of, Regina <i>v.</i>	ii.	455	Hodson, Regina <i>v.</i> note (a)	iv.	648
Henniker <i>v.</i> Wigg	iv.	792	Hoe, Steele <i>v.</i>	xiv.	431
Henwood <i>v.</i> Oliver	i.	409	Hoggart, Forster <i>v.</i>	xv.	155
Hepworth, Lambert <i>v.</i>	ii.	729	Hoggins <i>v.</i> Gordon	iii.	466
Herbert <i>v.</i> Sayer	v.	965	Holbeck, Inhabitants of, Regina <i>v.</i>	iv.	590
Herniman, Aeraman <i>v.</i>	xvi.	998	— Overseers of, Regina <i>v.</i>	xvi.	404
Hernod <i>v.</i> Wilkin	xi.	1	Holborrow, Regina <i>v.</i>	xiv.	421
Hertfordshire, Justices of, Regina <i>v.</i>	vi.	753	Holden, Amott <i>v.</i>	xviii.	593
Heseltine <i>v.</i> Seeley	xviii.	443	— Wilson <i>v.</i>	xiii.	815
Heslop, Chapman <i>v.</i>	xii.	928	Hole, Doe dem. Biddulph <i>v.</i>	xv.	848
— Haddrick <i>v.</i>	xii.	267	Holdsworth, Regina <i>v.</i>	i.	221
Heward, James <i>v.</i>	iii.	948	Holford <i>v.</i> Bailey	viii.	1000
Hewett, Wood <i>v.</i>	viii.	913	— <i>v.</i>	xiii.	426
Hewitt <i>v.</i> Hewitt	i.	110	— <i>v.</i> , Hankinson	v.	584
Hewitt, Campbell <i>v.</i>	xvi.	258	— Newton <i>v.</i> , In Error	vi.	921
Heyop, Regina <i>v.</i>	viii.	547	ror	xviii.	262
Hibbert, Milward <i>v.</i>	iii.	120	Hollands, Neve <i>v.</i>	xvii.	317
— Powell <i>v.</i>	xv.	129	Holloway <i>v.</i> The Queen	vi.	928
Hichens, Young <i>v.</i>	vi.	606	— <i>v.</i> , Turner	xiii.	951
Hickling, Inhabitants of, Regina <i>v.</i>	vii.	880	Holmes, Doe dem. Banks <i>v.</i>	x.	896
Hickman, Lawton <i>v.</i>	ix.	563	— Lewis <i>v.</i>		
Hicks, Marshall <i>v.</i>	x.	15	— London and South Western Railway Company	xiii.	211
Hide, Mosley, Bart. <i>v.</i>	xvii.	91	— Newlands <i>v.</i>	iii.	679
Higgins, Lyall <i>v.</i>	iv.	528	— <i>v.</i>	iv.	858
— Regina <i>v.</i> note (b)	viii.	149	— <i>v.</i>	v.	367
— <i>v.</i> Thomas	viii.	908	Holne, Inhabitants of, Regina <i>v.</i>	ix.	70
Higgs, St. Katharine Dock Company <i>v.</i>	x.	641	Holroyd <i>v.</i> Reed	v.	594
High Bickington, Inhabitants of, Regina <i>v.</i> note (a)	iii.	790	Holt <i>v.</i> Daw	xvi.	990
— <i>v.</i>	viii.	889	Holywell, Inhabitants of, Regina <i>v.</i>	xii.	61
Hill, Blackford <i>v.</i>	xv.	116	Homfray <i>v.</i> Scroope	xiii.	509
— Lane <i>v.</i>	xviii.	252	Hooper, Clifton <i>v.</i>	vi.	468
— White <i>v.</i>	vi.	487	— <i>v.</i> , Lane, In Error	x.	546
Hillingdon, Vicar &c. of, Regina <i>v.</i>	xviii.	718	— Planché <i>v.</i> note (b)	vi.	877
Hills, Cripps <i>v.</i>	v.	606	Hope <i>v.</i> Beadon	xvii.	509
— <i>v.</i> Mesnard	x.	266	— <i>v.</i> Harman note (d)	xvi.	761
Hilton <i>v.</i> Earl Granville	v.	701	Hopkins, Regina <i>v.</i>	i.	161
— <i>v.</i> Whitehead	xii.	734	Hopkinson, Doe dem. Bills <i>v.</i>	v.	224
Hinchliff, Regina <i>v.</i>	x.	356			
Hinde, Regina <i>v.</i>	v.	944			

	Vol.	Page		Vol.	Page
Hopkinson v. Lee	vi.	964	I.		
Hopper, Smith v.	ix.	1005			
Hopwood, Ex parte	xv.	121			
Hornby, Thompson v.	ix.	978			
Horne, Doe dem. Levy v.	iii.	757	Ince, Cumming v.	xi.	112
Horner v. Denham note (c)	xii.	813	Ingestre, Lord, Bell v.	xii.	317
Houlden v. Smith	xiv.	841	Ingham, Regina v.	xiv.	396
Howard v. Gosset	x.	359	——— —— v.	xvii.	884
——— Gosset v., In Error	x.	411	——— Thompson v.	xiv.	710
——— Lloyd v.	xv.	995	——— Winterbottom v.	vii.	611
Howes v. Barber	xviii.	588	Inglin, Rotton v.	ii.	667
Howkins v. Baldwin	xvi.	375	Ingram, Goddard v.	iii.	839
Howley v. Knight	xiv.	240	In re Appledore Commutation	viii.	139
Hubbard, Doe d. Hubbard v.	xv.	227	——— Camberwell Rent Charge	iv.	151
Hubbersty, Depperman v.	xvii.	766	——— The Chancellor, &c., of		
Hudson, Cobbett v.	xiii.	497	Oxford and Taylor	i.	952
——— v.	xv.	988	Clapham with Newby		
Huetson, Squire v.	i.	308	Tithes	xv.	620
Huggins v. Coates	v.	432	——— Clarke	ii.	619
Hughes v. Done	i.	294	——— Cook	vii.	653
Hull Dock Company, Jubb v.	ix.	443	Dent Commutation	viii.	43
——— Regina v.	vii.	2	——— Dimes	xiv.	554
——— v.	xviii.	325	——— Douglas	iii.	825
——— and Selby Railway Company, Regina v.	vi.	70	——— Edmundson	xvii.	67
Hulls v. Lea	x.	940	——— Glasbury Bridge	xv.	813
Hulme, Inhabitants of, Regina v.	iv.	538	——— Great Hale Tithes	xiv.	459
Hulton, Regina v.	xiii.	592	——— John Hammond	ix.	92
Humble v. Hunter	xii.	310	——— Humphreys	xiv.	388
Hume v. Lord Wellesley	viii.	521	——— King	viii.	129
Humphery, White v.	xi.	43	——— Kinning	x.	730
Humphreys, In re	xiv.	388	——— Lilley and Harvey	xiv.	403
Humphries v. Brogden	xii.	739	——— Mander	vi.	867
Hunnington, Inhabitants of, Regina v.	v.	273	——— Marshall and Dresser	iii.	878
Hunt, Regina v.	x.	925	——— Milner	v.	589
——— Roberts v.	xv.	17	——— Morten	v.	591
——— v. Robins	iii.	300	——— Myres	viii.	515
Hunter v. Caldwell	x.	69	——— Peerless	i.	143
——— v., In Err- ror	x.	83	——— Plews and Middleton	vi.	845
——— Humble v.	xii.	310	——— Sawyer	ii.	721
——— v. Liddell	xvi.	402	——— Seth Turner	xi.	80
Huntley v. Donovan	xv.	96	——— Shuttleworth	ix.	651
——— v. Russell	xiii.	572	——— Spooner and Payne	xi.	136
Hurry, Layton v.	viii.	811	——— Williams	ix.	976
Husthwaite, Inhabitants of, Regina v.	xviii.	447	——— Wright and Cromford Canal Company	i.	98
Hutchinson, Brown v.	xiii.	185	——— York, Dean of	ii.	1
——— Jenkins v.	xiii.	744	——— Ystradgynlais Commu-nation	viii.	32
——— v. Shepperton	xiii.	955	Inskip v. Preston	iv.	597
Hutt v. Morrell	xi.	426	Insole, Armitage v.	xiv.	728
——— v., In Error	xi.	438	Ireland v. Berry	v.	551
Hutton v. Ward	xv.	26	Ireson, Gibson v.	iii.	39
Hyatt v. Griffiths	xvii.	505	Irving, Regina v.	xii.	429
Hyde, Hare v.	xvi.	394	Isaac v. Daniel	viii.	600
	d 2		Ivey, Deere v.	iv.	379

GENERAL TABLE OF CASES

J.	K.		
Vol.	Page	Vol.	Page
Jackson, Broughton <i>v.</i>	xviii. 378	Keane, Barnes <i>v.</i>	xv. 75
Graham <i>v.</i>	vi. 811	Kearney, Sunderland Marine Insurance Company <i>v.</i>	xvi. 925
<i>v.</i> Magee	iii. 48	Keeling, Doe dem. Earl of Shrewsbury <i>v.</i>	xi. 884
<i>v.</i> Nunn	iv. 209	Keen <i>v.</i> The Queen	x. 928
<i>v.</i> Thompson	ii. 887	Keene <i>v.</i> Ward	xiii. 515
<i>v.</i> West	xvi. 280	Keighley, Inhabitants of, Regina <i>v.</i>	viii. 877
Jacobs <i>v.</i> Tarleton	xi. 421	Keir <i>v.</i> Leeman	vi. 308
James <i>v.</i> Brook	ix. 7	<i>v.</i> _____	ix. 371
<i>v.</i> Heward	iii. 948	Kelk, Regina <i>v.</i>	i. 660
<i>v.</i> Lynn	xiii. 845	Kemp <i>v.</i> Clark, In Error	xii. 647
<i>v.</i> Paul	i. 832	Kempe, Gibbon <i>v.</i>	ix. 609
<i>v.</i> Shenton	v. 199	<i>v.</i> _____	xii. 662
<i>v.</i> Williams	xv. 498	Kendall, Brierly <i>v.</i>	xvii. 937
Jay, Salters' Company <i>v.</i>	iii. 109	<i>v.</i> Regina <i>v.</i>	i. 366
Jeacocke, Stevens <i>v.</i>	xi. 731	Kenilworth, Inhabitants of, Regina <i>v.</i>	vii. 642
Jenkins <i>v.</i> Hutchinson	xiii. 744	Kennard, Doe dem. Gardner <i>v.</i>	xii. 244
<i>v.</i> Pugh	i. 631	Kennay, Rogers <i>v.</i>	ix. 592
<i>v.</i> Rawlins	iv. 419	Kennet and Avon Canal Company <i>v.</i> Great Western Railway Company	vii. 824
Jenkyns <i>v.</i> Brown	xiv. 496	Canal Navigation Company <i>v.</i>	xviii. 531
Jenney, Brook <i>v.</i>	ii. 265	Wetherington	i. 679
<i>v.</i>	vi. 328	Kennington, Bunch <i>v.</i>	v. 49
Jerdein, Breese <i>v.</i>	iv. 585	Kenrick, Regina <i>v.</i>	
Jessop <i>v.</i> Crawley	xv. 212	Kensington, Lord, Doe dem. Butler <i>v.</i>	viii. 429
Jerdan, Aberdeen <i>v.</i>	xv. 990	<i>v.</i> _____	xiii. 654
Johns <i>v.</i> Simons	ii. 425	Kent, Justices of, Regina <i>v.</i>	ii. 686
Johnson <i>v.</i> Faulkner	ii. 925	Kentmere, Inhabitants of, Regina <i>v.</i>	xvii. 551
<i>v.</i> Noden <i>v.</i>	xvi. 218	Kenyon, Catterall <i>v.</i>	iii. 310
<i>v.</i> Regina <i>v.</i>	v. 335	Keppel <i>v.</i> Shilson	iv. 914
<i>v.</i> _____	viii. 102	Kernot <i>v.</i> Pittis (2 E. & B. 406)	xviii. 890
Jones, Bird <i>v.</i>	vii. 742	Kesteven, Justices of, Regina <i>v.</i>	iii. 810
<i>v.</i> Carter	viii. 134	Kilpack <i>v.</i> Major	ii. 737
<i>v.</i> Clarke	iii. 194	Kilvington, South, Inhabitants of, Regina <i>v.</i>	v. 216
<i>v.</i> Corbett	ii. 828	Kine <i>v.</i> Evershed	x. 143
<i>v.</i> Doe dem. Clay	xiii. 774	King <i>v.</i> Alston	xii. 971
<i>v.</i> Downman note(a)	iv. 235	<i>v.</i> Bickley	ii. 419
<i>v.</i> Ewer	ix. 628	<i>v.</i> Birch	iii. 426
<i>v.</i> Gurdon	ii. 600	<i>v.</i> _____	vii. 669
<i>v.</i> Lucas	v. 949	<i>v.</i> In re	viii. 129
<i>v.</i> Morris	i. 397		
<i>v.</i> Phillips	xv. 859		
<i>v.</i> Regina	viii. 719		
<i>v.</i> Reynolds	i. 506		
<i>v.</i> Robin	x. 581		
<i>v.</i> _____ In Error	x. 620		
<i>v.</i> Williams	ii. 276		
<i>v.</i> (11 A. & E. 648)	ii. 71		
Jordan <i>v.</i> Binckes	xiii. 757		
<i>v.</i> Milner	viii. 615		
Joy, Culpeper <i>v.</i>	iv. 172		
Jubb <i>v.</i> Hull Dock Company <i>v.</i>	ix. 443		

	Vol.	Page		Vol.	Page
King, Pitcher <i>v.</i>	v.	758	Lane, Chapman <i>v.</i> , In Error	x.	63
— <i>v.</i> The Queen, In Error	vii.	795	— <i>v.</i> Goodwin	iv.	361
— <i>v.</i>	xiv.	31	— <i>v.</i> Hill	xviii.	252
— Regina <i>v.</i>	vii.	782	— Hooper <i>v.</i> , In Error	x.	546
— Rochdale Canal Company <i>v.</i>	xiv.	122	— <i>v.</i> Mullins	ii.	254
— <i>v.</i> — In Error	xiv.	136	— <i>v.</i> Ridley	x.	479
— Share	iii.	31	— <i>v.</i> Tewson (12 A. & E. 116, note (a))	ii.	264
— Simmonds, In Error	vii.	289	Langdon, Doe dem. Lord Egremont <i>v.</i>	xii.	711
— Twycross <i>v.</i>	vi.	663	Latchford, Inhabitants of, Regina <i>v.</i>	vi.	567
Kingclere, Inhabitants of, Regina <i>v.</i>	iii.	388	Latham <i>v.</i> Spedding	xvii.	440
Kinning's Case	x.	730	Latimer, Regina <i>v.</i>	xv.	1077
Kirk <i>v.</i> Bell	xvi.	290	Laurie <i>v.</i> Bendall	xii.	634
— Gibson <i>v.</i>	i.	850	— Curlewis <i>v.</i>	xii.	640
— Webster <i>v.</i>	xvii.	944	Lavey <i>v.</i> The Queen, In Error	xvii.	496
Knaresborough, Inhabitants of, Regina <i>v.</i>	xvi.	446	Lawes <i>v.</i> Shaw	v.	322
Knight <i>v.</i> Faith	xv.	649	Lawley, Doe dem. Draper <i>v.</i>	note	954
— Hawley <i>v.</i>	xiv.	240	Lawrence <i>v.</i> Great Northern Railway Company	xvi.	643
L.			— Remett <i>v.</i>	xv.	1004
Laforest <i>v.</i> Wall	ix.	599	Lawrie, Gordon <i>v.</i>	ix.	60
Lake, Allen <i>v.</i>	xviii.	560	Lawson, Regina <i>v.</i>	i.	486
— <i>v.</i> Duke of Argyll	vi.	477	— Solomon <i>v.</i>	viii.	823
Lamb, Marshall <i>v.</i>	v.	115	Lawton <i>v.</i> Hickman	ix.	563
— <i>v.</i> Micklethwaite	i.	400	Lax, Bainbridge <i>v.</i>	ix.	819
Lambert <i>v.</i> Hepworth	ii.	729	Laycock, Fenwick <i>v.</i>	i.	414
— Mason <i>v.</i>	xii.	795	— <i>v.</i>	ii.	108
Lambeth, Guardians of, Regina <i>v.</i>	v.	513	Layton <i>v.</i> Hurry	viii.	811
Lamond <i>v.</i> Davall	ix.	1030	Lazarus <i>v.</i> Cowie	iii.	459
— <i>v.</i> Eiffe	iii.	910	Lea, Hulls <i>v.</i>	x.	940
Lancashire and Yorkshire Railway Company, Regina <i>v.</i>	xvi.	906	Leaden Rothing, Regina <i>v.</i>	xiii.	181
— Justices of, Regina <i>v.</i>	ii.	85	Lean, Doe dem. Lean <i>v.</i>	i.	229
— <i>v.</i>	iii.	367	Lear <i>v.</i> Caldecott	iv.	128
— <i>v.</i>	iv.	910	Learmonth, Rolfe <i>v.</i>	xiv.	196
— <i>v.</i>	xii.	305	Leary <i>v.</i> Patrick	xv.	266
— <i>v.</i>	xviii.	361	Lechmere, Regina <i>v.</i>	xvi.	284
Lancaster and Preston Junction Railway Company, Regina <i>v.</i>	vi.	759	Ledgard and others, Regina <i>v.</i>	v.	616
Lancaster, Regina <i>v.</i>	x.	962	Lee, Hopkinson <i>v.</i>	vi.	964
Landkey, Inhabitants of, Regina <i>v.</i>	ix.	905	— <i>v.</i> Merrett	viii.	820
Landsberg, Bessell <i>v.</i>	vii.	638	— Wickham <i>v.</i>	xii.	521
Land Tax, Commissioners of, Regina <i>v.</i>	xvi.	381	Leeds and Bradford Railway Company, Doe dem. Hudson <i>v.</i>	xvi.	796
Lane <i>v.</i> Burghart	i.	933	— <i>v.</i>	xviii.	343
			Regina <i>v.</i>	v.	907
			Leeds, Inhabitants of, Regina <i>v.</i>	916	916
			— Mayor, &c., of, Regina <i>v.</i> (11 A. & E. 512)	ix.	910
				i.	319
				iv.	796

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Leeds, Recorder of, <i>Regina v.</i>			Lilleshall, Inhabitants of, <i>Re-</i>		
note (a)	ii.	547	<i>gina v.</i>	vii.	158
— — — — <i>v.</i>	viii.	623	<i>Lilley v. Elwin</i>	xii.	742
Leeman, Keir <i>v.</i>	vi.	308	— — and Harvey, In re	xiv.	403
— — — — <i>v.</i>	ix.	371	<i>Lindsay v. Leigh</i> , In Error	xii.	455
Leeming <i>v. Snaith</i>	xvi.	275	<i>Lindsey, Justices of, Reg. v.</i>	xiii.	484
Leggatt, <i>Regina v.</i>	xviii.	781	— — <i>Wakeman v.</i>	xiv.	625
Legge <i>v. Harlock</i>	xii.	1015	<i>Lines, Doe dem. Biddulph v.</i>	xii.	402
Leicester, Deputies of the			<i>Linford v. Fitzroy</i>	xiii.	240
Freemen of, <i>Regina v.</i>	xv.	671	<i>Linnit v. Chaffers</i>	iv.	762
— — — — <i>Severin v.</i>	xii.	949	<i>Lipscomb, Abington v.</i>	i.	776
Leicestershire and North-			<i>Little, Robinson v.</i>	ix.	602
amptonshire Canal Com-			<i>Littlechild v. Banks</i>	vii.	739
pany, Clarke <i>v.</i>	vi.	898	<i>Little Marlow, Inhabitants</i>	x.	223
Justices of,			<i>of, Regina v.</i>	vi.	174
<i>Regina v.</i>	xv.	88	— — <i>Rundle v.</i>	xvii.	303
Leigh, <i>Lindsay v.</i> , In Error	xi.	455	<i>Liverpool, Overseers of, Wil-</i>		
Leith, <i>Regina v.</i> (1 E. & B.			<i>son v.</i>		
121)	xvii.	784	— — — — <i>Recorder of, Re-</i>		
Leominster, Inhabitants of,			<i>gina v.</i>	xv.	1070
<i>Regina v.</i>	v.	640	<i>Livingston v. Whiting</i>	xv.	722
Leman, Flight <i>v.</i>	iv.	883	<i>Llanelli, Inhabitants of, Re-</i>		
Lemon, Barber <i>v.</i>	xi.	302	<i>gina v.</i>	xvii.	40
Leverick <i>v. Mercer</i>	xiv.	759	<i>Llewellyn, Lord Dunraven v.</i>	xv.	791
Le Veux <i>v. Berkeley</i>	v.	836	<i>Lloyd, Dails v.</i>	xii.	531
Levy, Connop <i>v.</i>	xi.	769	— — <i>Frost v.</i>	ix.	130
— — Moses <i>v.</i>	iv.	213	— — <i>v. Howard</i>	xv.	995
— — <i>v. Railton</i>	xiv.	418	— — <i>v. Oliver</i>	xviii.	471
— — <i>v. Webb</i>	ix.	427	— — <i>Re</i>	xv.	682
Lewis, Brydges <i>v.</i>	iii.	603	— — <i>Simons v.</i>	vii.	402
— — Gale <i>v.</i>	ix.	730	— — <i>Wilkinson v.</i>	vii.	27
— — Griffiths <i>v.</i>	vii.	61	<i>Lobb v. Stanley</i>	v.	574
— — — — <i>v.</i>	viii.	841	<i>Lock v. Ashton</i>	xii.	871
— — <i>v. Hance</i>	xi.	921	— — <i>v. Sellwood</i>	i.	736
— — Harris <i>v.</i>	x.	724	<i>Locke, Birmingham, Bristol</i>		
— — Holmes <i>v.</i>	x.	891	and Thames Junction		
— — Nicholson <i>v.</i>	xviii.	503	<i>Railway Company v.</i>	i.	256
— — Primrose <i>v.</i>	vi.	265	<i>Lockwood v. Wood</i>	vi.	31
— — Reilly <i>v.</i>	i.	349	— — <i>v. — — , In Er-</i>		
— — Samuel <i>v.</i>	viii.	685	<i>ror</i>	vi.	50
Leyland <i>v. Tancred</i>	xvi.	664	<i>Loder, Tobacco Pipe Makers'</i>	xvi.	765
— — Tancred <i>v.</i> , In Er-	xvi.	669	<i>Company v.</i>	xiv.	482
ror			<i>Loftus, Ricketts v.</i>		
Lichfield, Council of, <i>Re-</i>	iv.	893	<i>Logan, Waterford, &c., Rail-</i>	xiv.	672
gina <i>v.</i>	i.	453	<i>way Company v.</i>		
— — — — Mayor of, <i>Regina v.</i>	ii.	693	<i>London Assurance Company</i>		
— — — — <i>v.</i>	xvi.	781	<i>v. Bold</i>	vi.	514
In Error	viii.	65	— — and Blackwall Rail-		
— — — — Simpson <i>v.</i>	x.	534	<i>way Company, Walker v.</i>	iii.	744
Town Council of,	xvi.	402	— — — — <i>v.</i>	v.	365
<i>Regina v.</i>	xvii.	390	— — and Brighton Rail-		
Liddell, Hunter <i>v.</i>	ix.	612	<i>way Company, Carpe v.</i>	v.	747
— — Tarleton <i>v.</i>	xii.	925	— — Brighton and South		
Liddiard, Newton <i>v.</i>			<i>Coast Railway Company,</i>	xv.	313
— — — — <i>v.</i>			<i>Regina v.</i>		
			— — Grand Junction Rail-		
			<i>way Company v. Graham</i>	i.	271

REPORTED IN THE NEW SERIES.

[23]

	Vol.	Page		Vol.	Page	
London, Grand Junction Rail-way Company v. Gunston	i.	271	Lucas v. Jones	v.	949	
— and Greenwich Rail-way Company, Regina v.	iii.	166	Lund, Marson v.	xiii.	664	
— and North Western Railway Company v. Bedford	xvii.	978	— v.	xvi.	344	
— Collett v.	xvi.	984	Luton Roads, Trustees, Regina v.	i.	860	
Lowe v.	xviii.	632	Lyall v. Higgins	iv.	528	
Regina v.	xvi.	864	Lydeard St. Lawrence, In-habitants of, Regina v. (11 A. & E. 616)	ii.	63	
Shrewsbury and Birmingham Railway Company v.	xvii.	652	Lynch v. Nurdin	i.	29	
— and South Western Railway Company, Holmes v.	xiii.	211	Lynes, Graham v.	vii.	491	
Regina v.	i.	558	Lynn, James v.	xiii.	845	
Justices of, Regina v.	xiii.	775	Lyon, Petch v.	ix.	147	
note (a) v.	xviii.	421		M.		
Lord Mayor of, Regina v.	ix.	41	Macaulay, Bailey v.	xiii.	815	
Regina v.	v.	555	MacCarthy v. Nepean	vi.	252	
Error v.	xiii.	1	Macclesfield, Inhabitants of, Regina v.	note (c)	xi.	78
Londonderry and Coleraine Railway Company, Regina v.	xiii.	30	Re-			
Marquis of, Shepherd v.	xviii.	145	gina v.	xiii.	881	
Long, Regina v.	i.	740	Mc'Connell, Walley v.	xiii.	903	
Longbottom, Regina v.	xii.	816	Mc'Ewen v. Woods	xi.	13	
Longhorn, Regina v.	xvii.	77	Macgregor v. Dover and Deal Railway Company	xviii.	618	
Longwood, Regina v.	xiii.	116	Machen, Regina v.	xiv.	74	
Churchwardens and Overseers of, Reg. v.	xvii.	871	Mackenzie v. Sligo and Shan-non Railway Company	xviii.	862	
Loonie v. Oldfield	ix.	574	Wharton v.	v.	606	
Lorant, Scadding v.	xiii.	687	Mc'Laren, Findon v.	vi.	891	
ror v. —, In Error	xiii.	706	McMahon, Gardner v.	iii.	561	
Lord, Regina v.	xii.	757	McNaughten, Blakewell v.	i.	127	
Lordsmere, Inhabitants of, Regina v.	xv.	689	McPherson, Cook v.	viii.	1030	
Louch, Duncan v.	vi.	904	Mc'Swiney v. Royal Exchange Assurance Co.	xiv.	634	
Lovelock v. Franklyn	viii.	371	Royal Exchange Assurance Co. v., In Error	xiv.	646	
Lowe, Allen v.	iv.	66	Maddox, Seymour v.	xvi.	326	
— v. —	iv.	66	Madeley, Inhabitants of, Regina v.	xv.	43	
— v. London and North Western Railway Company	xviii.	632	Madocks, Wright v.	viii.	119	
Lowley v. Rossi	xii.	958	Magee, Jackson v.	iii.	48	
Lowndes v. Earl of Stamford	xviii.	425	Magnay v. Burt, In Error	v.	281	
Goodall v.	vi.	464	— v. Monger	iv.	817	

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Manchester, Council of, <i>Regina v.</i>	ix.	458	Massey, Doe d. Baddeley <i>v.</i>	xvii.	373
Inhabitants of, <i>Regina v.</i>	viii.	572	<i>v. Goodall</i>	xvii.	310
<i>Re-gina v.</i> note	xvii.	46	Master Pilots, &c., of Newcastle-upon Tyne <i>v. Bradley</i> , (2 E. & B. 428, note (a))	xviii.	144
Mayor, &c., of, <i>Gee v.</i>	xvii.	737	Matthews, Morris <i>v.</i>	ii.	293
<i>v.</i> <i>Manchester, Overseers of Re-gina v.</i>	xvii.	859	<i>Vaughan v.</i>	xiii.	187
<i>Overseers of, Manchester, Mayor, &c., of, v.</i>	v.	402	May <i>v. Burdett</i>	ix.	101
<i>Re-gina v.</i>	xvii.	859	Maybery <i>v. Mansfield</i>	ix.	754
<i>Sheffield and Lincolnshire Railway Company, Austin v.</i>	xvi.	600	Mayes, Farrow <i>v.</i>	xviii.	516
Mander, In re	vi.	867	Mayfield <i>v. Robinson</i>	vii.	486
Manesty, Morris <i>v.</i>	vii.	674	Mellor <i>v. Walker</i>	xi.	478
Mansfield, Inhabitants of, <i>Regina v.</i>	i.	444	Melluish <i>v. Collier</i>	xv.	878
<i>Maberly v.</i>	ix.	754	Memoranda	i.	388
<i>Strickland v.</i>	viii.	675		ii.	243
Manton, Hartley <i>v.</i>	v.	247		ii.	424
Marchant, Robinson <i>v.</i>	vii.	918		iii.	1041
Mardall <i>v. Thellusson</i>	xviii.	857		iii.	686
Margitson, Simpson <i>v.</i>	xi.	23		iv.	1
Marks, Absolon <i>v.</i>	xi.	19		iv.	654
Markwell <i>v. Dyson</i>	xiv.	820		v.	831
Marlborough, Duke of, Ex parte	v.	955		vi.	463
Marris, Andrews <i>v.</i>	i.	3		vi.	720
Marryat, Sims <i>v.</i>	xvii.	281		vii.	1
Marsh, Bownes <i>v.</i>	x.	787		viii.	62
Marshall, Barnes <i>v.</i>	xviii.	785		xiii.	310
<i>and Dresser, In re</i>	iii.	878		ix.	597
<i>v. Hicks</i>	x.	15		xii.	1050
<i>v. Lamb</i>	v.	115		xiii.	854
<i>v. Nicholls</i>	xviii.	882		xiv.	522
<i>v. Powell</i>	ix.	779		xv.	184
<i>v. Sharland</i>	xv.	1051		xv.	1
Marson <i>v. Lund</i>	xiii.	664		xvi.	986
<i>v.</i>	xvi.	344		xvi.	739
Martin, Regina <i>v.</i> note (a)	ii.	1037		xvii.	502
<i>v. Temperley</i>	iv.	298	Mendham, Inhabitants of, <i>Regina v.</i>	xviii.	1
<i>v. Wright</i>	vi.	917	Mercer, Leverick <i>v.</i>	ix.	971
Martindale <i>v. Smith</i>	i.	389	<i>v. Whall</i>	xiv.	759
Martins <i>v. Upcher</i>	iii.	662	Merchant <i>v. Frankis</i>	v.	447
Marton cum Grafton, Inhabitants of, <i>Regina v.</i>	x.	971	<i>Traders' Company, Briggs v.</i>	iii.	1
Martyn <i>v. Clue</i>	xviii.	661	Insurance Company, Halkett <i>v.</i>	xiii.	167
<i>Edwards v.</i>	xvii.	693	Meredith <i>v. Gittins</i>	xviii.	963
Mason <i>v. Lambert</i>	xii.	795	Merionethshire, Inhabitants of, <i>Regina v.</i>	xviii.	257
<i>v. Paynter</i>	i.	974	Justices of,	vi.	343
			<i>Regina v.</i>	vi.	163
			Merrett, Lee <i>v.</i>	viii.	820
			Merson, Regina <i>v.</i>	iii.	895
			Mesnard, Hills <i>v.</i>	x.	266
			Mess, Walther <i>v.</i>	vii.	189

REPORTED IN THE NEW SERIES.

[25]

	Vol.	Page		Vol.	Page
Meyrick v. Anderson	xiv.	719	Moore, Doe dem. Dayman v.	ix.	555
Michael, Doe dem. Earl of Ashburnham v.	xvi.	620	—— Mortimer v.	viii.	294
v.	xvii.	276	—— Tanner v.	ix.	1
Micklethwaite, Lamb v.	i.	400	More, Page v.	xv.	684
Middlesex, Justices of, Regina v.	iv.	807	Morewood, Wood v.	note iii.	440
Pauper Lunatic Asylum, Visiting Justices of, Regina v.	ii.	433	Morgan v. Powell	iii.	278
Registrar of, Regina v.	vii.	156	—— Williams v.	xv.	782
v.	xv.	976	Morley, Carratt v.	i.	18
Sheriff of, Regina v.	v.	365	Morpeth, Lord, Chabot v.	xv.	446
Treasurer, Regina v.	xviii.	553	Morphett, Doe dem. Mayor of Richmond v.	vii.	577
Midland Railway Company, Blake v.	xviii.	93	Morrell, Hutt v.	xi.	425
Regina v.	viii.	587	—— v. In Error	xii.	438
Midville, Inhabitants of, Regina v.	xv.	313	Morris v. Jones	i.	397
Milbanke v. Grant	iv.	240	—— v. Manesty	vii.	674
Mildenhall, Inhabitants of, Regina v.	iii.	690	—— v. Matthews	ii.	293
Mile End Old Town, Overseers of, Regina v.	ii.	517	—— v. Walker	xv.	589
Trustees of, East London Waterworks Company v.	x.	208	Morrison, Blandford v.	xv.	724
Miles v. Bough	xvii.	512	Mortimer v. Moore	viii.	294
v. Williams	iii.	845	Mortlock, Regina v.	vii.	459
Millen v. Dent	ix.	47	Morten, In re	v.	591
Millett, Doe dem. Millett v.	x.	846	Morton, Daniel v.	xvi.	198
Milligan, Ferrand v.	xi.	1036	—— Regina v.	iv.	146
Mills v. Blackall	vii.	730	—— v. Tibbett	xv.	428
Milner, In re	xi.	358	Moses v. Levy	iv.	213
v. Jordan	v.	589	Mosley, Bart. v. Hide	xvii.	91
Milward v. Hibbert	viii.	615	Moss v. Sweet	xvi.	493
Minster, Inhabitants of, Regina v.	iii.	120	Mould v. Williams	v.	469
Mitchell, Regina v.	xiv.	349	Mouls, Beale v.	x.	976
Mittelholzer v. Fullarton, In Error	xvi.	228	Mount, Sellwood v.	i.	726
Moffatt, Doe d. Davenish v.	ii.	636	Mousley, Regina v.	viii.	946
Molesworth, Inhabitants of, Regina v.	vi.	989	Moxham, Hartley v.	iii.	701
Regina v.	xv.	257	Mowatt, West Cornwall Railway Company v.	xv.	521
Monger, Magnay v.	ix.	65	Moxsey, Orchard v. (2 E. & B. 206)	xvii.	948
Monk Bretton, Inhabitants of, Regina v.	iv.	817	Much Hoole, Overseers of, v. Preston, Overseers of	xvii.	548
Montague v. Smith	xvii.	688	Mullett v. Challis	xvi.	239
Montefiore, Wheeler v.	ii.	133	Mullins, Lane v.	ii.	254
Baillie v.	viii.	489	Mumford, Pye v.	xi.	666
			Munden v. Duke of Brunswick	x.	656
			Munt, Rumball v.	viii.	382
			Murray, Boucher v.	vi.	362
			—— v. The Queen, In Error	vii.	700
			Musgrave v. Drake	v.	185
			—— v. Emmerson	x.	326
			Musgrave, Cocker v.	ix.	223
			Myres, In re	viii.	515
			Mylor, Inhabitants of, Regina v.	xi.	55
			Mytton, Wood v.	x.	805

GENERAL TABLE OF CASES

N.	Vol.	Page	Vol.	Page
Nairne, Small <i>v.</i>	xiii.	840	Newton Ferrers, Inhabitants of, Regina <i>v.</i>	ix. 32
Nancarrow, Newton <i>v.</i>	xv.	144	Newton's Case	xiii. 716
Nanney, Nixon <i>v.</i>	i.	747	New Windsor, Mayor of, Regina <i>v.</i>	vii. 908
Napier, Ex parte	xviii.	692	Nias, Australasia, Bank of, <i>v.</i>	xvi. 717
Nash <i>v.</i> Allen	iv.	784	Nicholl, Doe dem. Win-grove <i>v.</i>	xiii. 126
— Ex parte	xv.	92	Nicholls, Marshall <i>v.</i>	xviii. 882
Nathan <i>v.</i> Storey	xii.	956	— Stretton	x. 346
Naylor, Wharton <i>v.</i>	xii.	673	Nicholson, Lewis <i>v.</i>	xviii. 503
Neal, Thorne <i>v.</i>	ii.	726	Nickalls <i>v.</i> Warren	vi. 615
Neale <i>v.</i> Postlethwaite	i.	243	Nickells <i>v.</i> Atherstone	x. 944
— <i>v.</i> Ratcliffe	xv.	916	Nicol <i>v.</i> Alison	xi. 1006
Neave <i>v.</i> Weather	iii.	984	Nightingale, Wilson <i>v.</i>	viii. 1034
Needham <i>v.</i> Rawbone	n. (a) vi.	771	Nixon, Bowers <i>v.</i>	xii. 546
Neeves <i>v.</i> Burrage	xiv.	504	— <i>v.</i> Nanney	i. 747
Nepean, MacCarthy <i>v.</i>	vi.	252	Noden <i>v.</i> Johnson	xvi. 218
Nettleship, Samuel <i>v.</i>	iii.	188	Norbury, Inhabitants of, Regina <i>v.</i>	note (a) vi. 534
Neve <i>v.</i> Hollands	xviii.	262	— Regina <i>v.</i> (6 Q. B. 934, note (a))	viii. 958
Nevill, Regina <i>v.</i>	viii.	452	Norfolk, Commissioners of Sewers, Regina <i>v.</i>	xv. 549
— Roc dem. Snape <i>v.</i>	xi.	466	Norris, Robertson <i>v.</i>	xi. 916
Newbon, Wakefield <i>v.</i>	vi.	276	North Bovey, Inhabitants of, Regina <i>v.</i>	ii. 500
Newbury, Mayor, &c., of, Regina <i>v.</i>	i.	751	Northowran, Inhabitants of, Regina <i>v.</i>	ix. 24
Newcastle, All Saints, Inhabitants of, Regina <i>v.</i>	i.	428	North Riding, Justices of, Regina <i>v.</i>	vii. 154
— &c., Railway Company, Hawthorn <i>v.</i>	n. (a) iii.	734	— Staffordshire Railway Company, Doe dem. Ar-mistead <i>v.</i>	xvi. 526
— upon-Tyne, Mas-ter Pilots, &c., of, v. Brad-ley (2 E. & B. note (a))	xviii.	144	Bos-tock <i>v.</i>	xviii. 777
Newington, Brandon <i>v.</i>	iii.	915	Glo-ver <i>v.</i>	xvi. 912
Newlands <i>v.</i> Holmes	iii.	679	North <i>v.</i> Wakefield	xiii. 536
— <i>v.</i> — In Error	iv.	858	Norwich, Mayor, &c., of, Regina <i>v.</i>	iii. 285
Newlands, Holmes <i>v.</i>	v.	{ 367 634	Notley, Tolhurst <i>v.</i>	xi. 406
Newmarket Railway Com-pany, Gage <i>v.</i>	xviii.	457	Nott, Regina <i>v.</i>	iv. 768
— Re-gina <i>v.</i>	xv.	702	Nunn, Jackson <i>v.</i>	iv. 209
New Sarum, Inhabitants of, Regina <i>v.</i>	vii.	941	Nurdin, Lynch <i>v.</i>	i. 29
Newton <i>v.</i> Allin	i.	518	Nurse, Bond <i>v.</i>	x. 244
— Banks <i>v.</i>	xi.	340	Nye, Thompson <i>v.</i>	xvi. 175
— Barrack <i>v.</i>	i.	525	O.	
— Belcher	ix.	612	Oakley, Valpy <i>v.</i>	xvi. 941
— <i>v.</i>	xii.	921	O'Connor, Regina <i>v.</i>	v. 16
— Boodle	ix.	948	Oldfield, Loonie <i>v.</i>	ix. 574
— Constable	ii.	157	Oldham Union, Overseers of, Regina <i>v.</i>	x. 700
— Holford, In Error	vi.	921		
— Liddiard note (a)	ix.	612		
— <i>v.</i>	xii.	925		
— Nancarrow	xv.	144		
— Palmer	ix.	612		
— Towers <i>v.</i>	i.	319		

	Vol.	Page		Vol.	Page
Old Stratford, Inhabitants of, <i>Regina v.</i>	ii.	513	Palmer, Doe dem. <i>Shallcross v.</i>	xvi.	747
O'Hare <i>v.</i> Reeves	xiii.	659	—— <i>Newton v.</i>	ix.	612
Oliver, Henwood <i>v.</i>	i.	409	Panton <i>v.</i> Williams, In Error	ii.	169
—— Lloyd <i>v.</i>	xviii.	471	Pargeter <i>v.</i> Harris	vii.	708
—— Robson <i>v.</i>	x.	704	Parham, <i>Regina v.</i>	xiii.	858
Oliverson <i>v.</i> Brightman	viii.	781	Parker, <i>Regina v.</i>	iii.	292
Ollivant <i>v.</i> Bayley	v.	288	—— Scott <i>v.</i>	i.	809
O'Neil <i>v.</i> Brindle	ix.	582	Parkes <i>v.</i> Smith	xv.	297
Orchard <i>v.</i> Moxsy (2 E. & B. 206)	xvii.	948	Partington, Ex parte	vi.	649
Order of Judges	viii.	1018	Partridge <i>v.</i> Bank of England, In Error	ix.	396
Ormerod, Haworth <i>v.</i>	vi.	300	Patrick, Leary <i>v.</i>	xv.	266
Ormond, Blair <i>v.</i> , In Error	xiv.	732	Paul <i>v.</i> James	i.	832
—— <i>v.</i>	xvii.	423	Paull <i>v.</i> Simpson	ix.	365
Orton, Inhabitants of, <i>Regina v.</i>	vii.	120	Paupierre, Day <i>v.</i>	xiii.	802
—— Trustees of, <i>Regina v.</i>	xiv.	139	Paxton <i>v.</i> The Great North of England Railway Company	viii.	938
Ossett, Inhabitants of, <i>Regina v.</i>	xvi.	975	Payne, Bate <i>v.</i>	xiii.	900
Ostler <i>v.</i> Cooke	xiii.	143	—— Chaney <i>v.</i>	i.	712
—— <i>v.</i> In Error	xviii.	831	—— Doe dem. Bedford Charity <i>v.</i>	vii.	287
Oswestry, Treasurer of, <i>Regina v.</i>	xii.	239	Paynter, Mason <i>v.</i>	i.	974
Oundle, Inhabitants of, <i>Regina v.</i> note (a)	iii.	353	—— Regina <i>v.</i>	vii.	255
Over, Inhabitants of, <i>Regina v.</i>	xiv.	425	—— <i>v.</i> The Queen, In Error	xiii.	399
Overton, <i>Regina v.</i>	iv.	83	Peacock, Bracegirdle <i>v.</i>	x.	908
Owen, Bowen <i>v.</i>	xi.	130	Peake <i>v.</i> Screech	viii.	174
Owen, <i>Regina v.</i>	xv.	476	Pearce <i>v.</i> Chaplin	vii.	603
Oxford, Chancellor, &c., of, and Taylor, In re	i.	952	—— Cook <i>v.</i>	ix.	802
—— Guardians of, <i>Regina v.</i> note (g)	xvii.	457	Pearcy, <i>Regina v.</i>	xvii.	1044
—— Judge of the Mayors' Court of, <i>Rex v.</i> note (a)	xiii.	21	Pardon, Underhill	xvi.	902
Oxfordshire, Justices of, <i>Regina v.</i>	iv.	177	Pearson, Bailey <i>v.</i>	xiii.	120
Oxley, <i>Regina v.</i>	vi.	256	Peerless, In re	xii.	815
P.					
Packer <i>v.</i> Gibbins	i.	421	Pegg, Brown <i>v.</i>	i.	143
Padwick <i>v.</i> Turner	xi.	124	Peirce <i>v.</i> Derry	vi.	1
Page, De Porquet <i>v.</i>	xv.	1073	Pelham, <i>Regina v.</i>	iv.	635
—— Doe dem. Evans <i>v.</i>	v.	767	Pemberton <i>v.</i> Colls	viii.	959
—— <i>v.</i> Hatchett	viii.	{ 187 593	—— <i>v.</i> Vaughan	x.	461
—— <i>v.</i> More	xv.	684	Pembridge, <i>Regina v.</i>	iii.	87
Paine <i>v.</i> Strand Union, Guardians of	viii.	326	Penfold, Doe dem. Watton <i>v.</i>	iii.	901
Palk, Adams <i>v.</i>	iii.	2	Penhall, Colombine <i>v.</i>	xiii.	757
—— <i>v.</i> Force	xii.	666	Pennell <i>v.</i> Attenborough	iv.	128
—— <i>v.</i> Shinner	xviii.	568	—— <i>v.</i> Rhodes	ix.	868
Palmer <i>v.</i> Costerton	iv.	525	Penniall <i>v.</i> Harborne	xi.	114
			Perkin, <i>Regina v.</i>	vii.	368
			Perkins, <i>Regina v.</i>	xiv.	165
			Perranzabuloe, Inhabitants of, <i>Regina v.</i>	iii.	229
			Perry <i>v.</i> Fitzhowe	viii.	400
			—— <i>v.</i> Slade	viii.	757
			Petch <i>v.</i> Lyon	viii.	115
			Peterhouse, Master, &c., of, <i>Regina v.</i>	ix.	147
			Petley, Dimes <i>v.</i>	i.	314
			Pettit, Thompson <i>v.</i>	xv.	276
				x.	101

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Peyton <i>v.</i> Watson	iii.	658	Poor Law Commissioners, In re St. Mary Abbott's, Kensington, Regina <i>v.</i>	ix.	291
Philipson <i>v.</i> Earl of Egremont	vi.	587	United Parishes of St. Giles and St. George, Regina <i>v.</i>	xvii.	445
Phillips <i>v.</i> Broadley	ix.	744	Poppleton, Everard <i>v.</i>	xvii.	457
——— Doe dem. Blewitt <i>v.</i>	i.	84	Portugal, Queen of, De Haber <i>v.</i>	v.	181
——— Ex parte (2 E. & B. 192)	xviii.	890	Postlethwaite, Neale <i>v.</i>	xvii.	171
——— Doe dem. Jacobs <i>v.</i>	viii.	158	Pott Shrigley, Inhabitants of, Regina <i>v.</i>	i.	243
——— <i>v.</i> Jones	x.	130	Powell, Crake <i>v.</i> (2 E. & B. 210)	xiii.	143
——— Regina <i>v.</i>	xv.	859	——— Doe dem. Woodhouse <i>v.</i>	xviii.	133
——— Russell <i>v.</i>	xiv.	891	——— <i>v.</i> Hibbert	viii.	576
——— <i>v.</i> Shervill	vi.	944	——— Marshall <i>v.</i>	xv.	129
Phippard, Filliter <i>v.</i>	xi.	347	——— Morgan <i>v.</i>	ix.	779
Phipps, Daubeney <i>v.</i>	xvi.	504	——— Prichard <i>v.</i>	iii.	278
——— <i>v.</i>, In Error	xvi.	514	——— Steward of the Manor of Richmond, Regina <i>v.</i>	x.	589
Pickering, Pocock <i>v.</i>	xviii.	789	Pratt <i>v.</i> Hanbury	i.	352
Pickles, Regina <i>v.</i> . note (a)	iii.	599	Preece, David <i>v.</i>	xiv.	190
Pike <i>v.</i> Stephens	xii.	465	——— Regina <i>v.</i>	v.	440
Pilkington, Inhabitants of, Regina <i>v.</i>	v.	662	Prentice <i>v.</i> Harrison	iv.	852
Pinches <i>v.</i> Harvey	i.	868	Prest, Regina <i>v.</i>	xvi.	32
Pinder, Bateman <i>v.</i>	iii.	574	Preston, Inhabitants of, Regina <i>v.</i>	iv.	597
Pinniger, Edmunds <i>v.</i>	vii.	558	——— Overseers of, Much Hoole, Overseers of, <i>v.</i>	xvii.	548
Pipe <i>v.</i> Steele	ii.	733	——— Regina <i>v.</i>	xii.	816
Pitcher <i>v.</i> King	v.	758	——— E., Regina <i>v.</i>	xii.	891
Pittis, Kernot <i>v.</i> (2 E. & B. 406)	xviii.	890	Price <i>v.</i> Carter	vii.	838
Pixley, Inhabitants, Reg. <i>v.</i>	iv.	711	——— Crotty <i>v.</i> . note (a)	xv.	1003
Planché <i>v.</i> Hooper note (b)	vi.	877	——— <i>v.</i> Quarrell (12 A. & E. 784)	iii.	413
Plews and Middleton, In re	vi.	845	Prichard <i>v.</i> Powell	x.	589
Plumer <i>v.</i> Brisco	xi.	46	Prickett, Deller <i>v.</i>	xv.	1081
Plyer, Doe dem. Payne <i>v.</i>	xiv.	512	——— <i>v.</i> Gratrix	viii.	1020
Pocock, Goodman <i>v.</i>	xv.	576	Priest Hutton, Inhabitants of, Regina <i>v.</i>	xvii.	59
——— <i>v.</i> Pickering	xviii.	789	Primrose, Lewis <i>v.</i>	vi.	265
——— Regina <i>v.</i>	viii.	729	Prior's Hardwick, Inhabitants of, Regina <i>v.</i>	xii.	168
——— <i>v.</i>	xvii.	34	Protheroe, Damerell <i>v.</i>	x.	20
Polkinghorn <i>v.</i> Wright	viii.	197	Pugh, Curtis <i>v.</i>	x.	111
Pollard, Dale <i>v.</i>	x.	504	——— <i>v.</i> Jenkins	i.	631
Pollitt <i>v.</i> Forrest	xi.	949	Pulman, Doe dem. Earl of Egremont <i>v.</i>	iii.	622
——— <i>v.</i>, In Error	xi.	962	Purchell <i>v.</i> Salter	i.	197
Pollock <i>v.</i> Stables	xii.	765	——— <i>v.</i>	i.	209
——— <i>v.</i> Stacy	ix.	1033	Pye <i>v.</i> Mumford	xi.	666
Polwart, Regina <i>v.</i>	i.	818			
Ponsonby, Lady Emily, Regina <i>v.</i>	iii.	14			
Pontefract, Overseers of, Ex parte Recorder of, Regina <i>v.</i>	iii.	391			
Poole, Doe dem. Biddulph <i>v.</i>	ii.	548			
——— Mayor, &c., of, Regina <i>v.</i>	xi.	713			
Poolly, Dally <i>v.</i>	i.	616			
Poor Law Commissioners, In re Brightonston, Regina <i>v.</i>	vi.	494			
	iii.	325			

Q.		R.			
	Vol.	Page		Vol.	Page
Quarrell, Price <i>v.</i> (12 A. & E. 784)	iii.	413	Rackham <i>v.</i> Bluck	ix.	691
Queen, The, Bristol Poor, Governor, &c., of, <i>v.</i>	xiii.	{ 405 414	Radcliffe, Rochdale Canal Company <i>v.</i>	xviii.	287
— Broome <i>v.</i>	xii.	834	Radnorshire, Justices of, Regina <i>v.</i>	ix.	159
— Bynner <i>v.</i>	ix.	523	Railstone <i>v.</i> York, Newcastle and Berwick Railway Company	xv.	404
— The, Campbell <i>v.</i> , In Error	xii.	799	Railton, Levy <i>v.</i>	xiv.	418
— — — <i>v.</i> (In Exchequer Chamber)	xii.	814	Raleigh, Atkinson <i>v.</i>	iii.	79
— De Bode, Baron, <i>v.</i>	xiii.	364	Ralph <i>v.</i> Harvey	i.	845
— — — <i>v.</i> Douglas	xiii.	42	Ramsay, Simpson <i>v.</i>	v.	371
— — — Douglas <i>v.</i>	xiii.	74	Ramshay, Ex parte	xviii.	173
— — — Gregory <i>v.</i> , In Error	xv.	{ 957 974	Rankin <i>v.</i> Hamilton	xv.	187
— — — Hamilton <i>v.</i> , In Error	ix.	271	Ransford <i>v.</i> Bosanquet, In Error	ii.	972
— — — Holloway <i>v.</i>	xvii.	317	Ratcliff, Neale <i>v.</i>	xv.	916
— — — Keen <i>v.</i>	x.	928	Ratcliffe Culey, Inhabitants of, Regina <i>v.</i>	ix.	18
— — — King <i>v.</i> , In Error	vii.	795	Ratton <i>v.</i> Davis	i.	496
— — — — <i>v.</i> , In Error	xiv.	31	Rawbone, Needham <i>v.</i> note (a)	vi.	771
— — — Lavy <i>v.</i>	xvii.	496	Rawlins <i>v.</i> Jenkins	iv.	419
— — — London, Lord Mayor of, <i>v.</i>	xiii.	30	Rawson, Chapman <i>v.</i>	viii.	673
— — — Murray <i>v.</i> , In Error	vii.	700	Ray <i>v.</i> Hirst	ix.	584
— — — Paynter <i>v.</i> , In Error	x.	980	Rayne, Ex parte	i.	982
— — — Rowley <i>v.</i>	vi.	668	Rayner <i>v.</i> Wright	iii.	922
— — — Ryalls <i>v.</i> , In Error	xi.	781	Read, Berney <i>v.</i>	vii.	79
— — — — <i>v.</i> (In Exchequer Chamber)	xi.	795	— Burling <i>v.</i>	xi.	904
— — — Sandwich, Mayor, &c., of, <i>v.</i>	x.	571	— Regina <i>v.</i>	xiii.	524
— — — Smith <i>v.</i>	xiii.	738	Re Appledore Tithe Commutation	viii.	139
— — — South Eastern Railway Company <i>v.</i>	xvii.	485	— Butler and Masters	xiii.	341
— — — Syderff <i>v.</i> , In Error	xi.	245	— Clipperton	xii.	687
— — — Tynte <i>v.</i> , In Error	vii.	216	— Cowgill	xvi.	336
— — — Whitehead <i>v.</i> , In Error	vii.	582	— Crosby Tithes	xiii.	761
— — — Williams <i>v.</i> , In Error	vii.	250	— Dent Tithe Commutation	viii.	43
— — — Wright <i>v.</i>	xiv.	148	— Edmundson	xvii.	67
— — — — <i>v.</i> , In Error. (Q. B. and Exch. C.)	xiv.	148	— Flewker	note (a) xvii.	572
— — — — of Portugal, De Haber <i>v.</i>	xvii.	171	— Lloyd	xv.	692
— — — — of Spain, Wadsworth <i>v.</i>	xvii.	196	— Mander	vi.	867
			— Plews and Middleton	vi.	845
			— Richards	xiii.	988
			— Toby	xii.	694
			— Wilcox	xiii.	666
			— Ystradgynlais Tithe Commutation	viii.	32
			Reece <i>v.</i> Taylor	note (b) xi.	318
			Reed, Betteley <i>v.</i>	iv.	511
			— Corsar <i>v.</i>	xvii.	540
			Reed, Holroyd <i>v.</i>	v.	594
			Rees, Evans <i>v.</i>	ii.	334
			Reeve, Beaumont <i>v.</i>	viii.	483
			— Regina <i>v.</i>	iv.	211
			Reeves, O'Hare <i>v.</i>	xiii.	659

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Reeves <i>v.</i> White . .	xvii.	995	Regina <i>v.</i> Barnard Castle, Inhabitants of . .	i.	246
Regina <i>v.</i> . .	xv.	1060	_____ <i>v.</i> Barnoldswick, In- habitants of . .	iv.	499
_____ <i>v.</i> Aberdare Canal Company . .	xiv.	854	_____ <i>v.</i> Barnes . .	iii.	437
_____ <i>v.</i> Aberdaron, Inha- bitants of . .	i.	671	_____ <i>v.</i> Barnsley, Inhabi- tants of . .	xii.	193
_____ <i>v.</i> Abrahams . .	iv.	157	_____ <i>v.</i> Barton . .	xiii.	389
_____ <i>v.</i> Acton, Inhabitants of . .	viii.	108	_____ <i>v.</i> Basingstoke, Inha- bitants of . .	xiv.	611
_____ <i>v.</i> Adderbury East, Inhabitants of . .	v.	187	_____ <i>v.</i> Bassett . .	xvii.	332
_____ <i>v.</i> Addingham, Inha- bitants of . .	xii.	63	_____ <i>v.</i> Bath and Wells, Bishop of . .	v.	147
_____ <i>v.</i> Albert . .	v.	37	_____ <i>v.</i> Bodingham, Inha- bitants of . .	v.	683
_____ <i>v.</i> Aldbrough, Inha- bitants of . .	xiii.	190	_____ <i>v.</i> Belton . .	xi.	379
_____ <i>v.</i> Alderson . .	i.	878	_____ <i>v.</i> Bessell . .	xvi.	810
_____ <i>v.</i> All Saints, Derby, Inhabitants of . .	xiv.	207	_____ <i>v.</i> Betts . .	xv.	540
_____ <i>v.</i> All Saints, New- castle . .	i.	428	_____ <i>v.</i> _____. .	xvi.	1022
_____ <i>v.</i> Alternum, Inhabi- tants of (10 A. & E. 699)	i.	251	_____ <i>v.</i> Bingham . .	iv.	877
_____ <i>v.</i> Ambergate, &c., Railway Company . .	xvii.	{ 362 957	_____ <i>v.</i> Biram . .	xvii.	969
_____ <i>v.</i> Anderson . .	ii.	740	_____ <i>v.</i> Birmingham, Bo- rough of . .	x.	116
_____ <i>v.</i> _____. Inhabi- tants of . .	ix.	663	_____ <i>v.</i> _____. and Gloucester Railway Com- pany . .	ii.	47
_____ <i>v.</i> Ardsley, Church- wardens of . .	v.	71	_____ <i>v.</i> _____. Inha- bitants of . .	iii.	223
_____ <i>v.</i> _____. note v.		163	_____ <i>v.</i> _____. Inha- bitants of . .	v.	210
_____ <i>v.</i> Arkwright . .	xiii.	960	_____ <i>v.</i> _____. Inha- bitants of . .	viii.	410
_____ <i>v.</i> Arnaud . .	ix.	806	_____ <i>v.</i> _____. and Oxford Railway Company	xv.	634
_____ <i>v.</i> Arnold . .	xviii.	553	_____ <i>v.</i> Blake . .	vi.	126
_____ <i>v.</i> Ashburton, Inha- bitants of . .	viii.	871	_____ <i>v.</i> Blakemore . .	xiv.	544
_____ <i>v.</i> _____. Lord note v.		48	_____ <i>v.</i> Blane . .	xiii.	769
_____ <i>v.</i> Aston nigh Birm- ingham, Inhabitants of . .	xii.	56	_____ <i>v.</i> Bloxham, Inha- bitants of . .	vi.	528
_____ <i>v.</i> Attercliffe cum Darnal, Inhabitants of . .	xiii.	933	_____ <i>v.</i> Blanshard . .	xiii.	318
_____ <i>v.</i> Avery . .	xviii.	576	_____ <i>v.</i> Bolton . .	i.	66
_____ <i>v.</i> Aylesbury and Walton, Inhabitants of . .	ix.	261	_____ <i>v.</i> Booth . .	xii.	884
_____ <i>v.</i> Badcock . .	vi.	787	_____ <i>v.</i> Boucher . .	iii.	641
_____ <i>v.</i> Badger . .	iv.	468	_____ <i>v.</i> Bowen . .	xiii.	790
_____ <i>v.</i> Bakewell, Inha- bitants of . . note (a)	vii.	601	_____ <i>v.</i> Bradford, Inha- bitants of . . note (e)	viii.	571
_____ <i>v.</i> Bamber, In Error . .	v.	279	_____ <i>v.</i> Brandt . .	xvi.	462
_____ <i>v.</i> Bangor, Inha- bitants of . . note (b)	xi.	399	_____ <i>v.</i> Braintree Union, Guardians of . .	i.	130
_____ <i>v.</i> _____. Overseers of . .	x.	91	_____ <i>v.</i> Brecon, Inhabitants of . .	xv.	813
_____ <i>v.</i> Bannatyne . .	xvii.	524	_____ <i>v.</i> Bridgewater, In- habitants of (10 A. & E. 693) . .	i.	160
_____ <i>v.</i> Baptist Missionary Society . .	x.	884	_____ <i>v.</i> Brier . .	xiv.	658
			_____ <i>v.</i> Brighthelmston, Inhabitants of . .	i.	654
			_____ <i>v.</i> _____. .	vii.	549

REPORTED IN THE NEW SERIES.

[31]

Vol.	Page		Vol.	Page
Regina <i>v.</i> Brightelmston		Regina <i>v.</i> Cheltenham, Com-	i.	467
Poor, Directors of	iii. 342	missioners for Paving	xv.	513
— <i>v.</i> Brightside Bier-	xiii. 933	— <i>v.</i> Chester, Dean and	xvii.	504
low, Inhabitants of	i. 535	Chapter of	xv.	220
— <i>v.</i> Bristol Dock Co.	ii. 64	— <i>v.</i> Chichester n. (c)	xv.	
— <i>v.</i> —	iv. 162	— <i>v.</i> Chilton	xv.	
— <i>v.</i> — and Exeter	xiii. 405	— <i>v.</i> Chiswick, Inhabit-	x.	241
Railway Company	xvii. 833	ants of	xii.	515
— <i>v.</i> — Poor, Go-	xiii. 654	— <i>v.</i> Chorley	xii.	
vernor, &c., of	viii. 883	— <i>v.</i> Christchurch, In-	xii.	149
— <i>v.</i> Brown	iii. 800	habitants of	v.	887
— <i>v.</i> Browne	v. 348	— <i>v.</i> Clark	vi.	349
— <i>v.</i> Buchanan	xi. 929	— <i>v.</i> Clarke	xiii.	354
— <i>v.</i> Buckinghamshire,	ix. 529	— <i>v.</i> Clayton	i.	886
Justices of	xii. 321	— <i>v.</i> Clint, Inhabitants	xvi.	480
— <i>v.</i> Burnby	xvii. 52	of (11 A. & E. 624, note	x.	
— <i>v.</i> Button	iv. 801	(b))	xii.	
— <i>v.</i> Bynner note (a)	vi. 729	— <i>v.</i> Cockburn, Sir G.	xii.	909
— <i>v.</i> Byron	ii. 330	— <i>v.</i> Colerne, Inhabit-	xiii.	
— <i>v.</i> Caldecote, Inhabi-	xvi. 19	ants of	viii.	75
tants of	xvii. 325	— <i>v.</i> Coles	xvii.	816
— <i>v.</i> Caledonian Rail-	vii. 126	— <i>v.</i> Colling	xii.	681
way Company	xiv. 110	— <i>v.</i> Collingwood	xiii.	179
— <i>v.</i> Cambridge, Mayor,	v. 201	— <i>v.</i> Combe	iii.	670
&c., of	vi. 507	— <i>v.</i> Commissioners of	viii.	981
— <i>v.</i> —	v. 901	Sewers for the Tower	viii.	538
— <i>v.</i> Camrose, Inhabit-	xvii. 503	Hamlets	x.	
ants of	xi. 173	— <i>v.</i> Conyers	xvi.	
— <i>v.</i> note (a)	iii. 378	— <i>v.</i> Cooper	x.	
— <i>v.</i> Canterbury, Arch-	xvi. 1012	— <i>v.</i> Cornwall, Justices	x.	
bishop of	xiii. 447	of	v.	9
— <i>v.</i> Carey	i. 247	— <i>v.</i> Cottle	xvi.	412
— <i>v.</i> Carlton, Inhabit-	xii. 206	— <i>v.</i> Cotton, Sir St. Vin-	xv.	569
ants of	ix. 942	cent, Bart.	xvi.	819
— <i>v.</i> Carmarthenshire,	v. 66	— <i>v.</i> Coward	x.	913
Justices of		— <i>v.</i> Crespin	xiv.	735
— <i>v.</i> Carnarvonshire,		— <i>v.</i> Cricklade St. Samp-	x.	812
Justices of		son's, Inhabitants of	xiv.	221
— <i>v.</i> Cartworth, Inhabi-		— <i>v.</i> Crondall, Inhabit-	v.	484
tants of		ants of	ii.	372
— <i>v.</i> Casterton, Inhabi-		— <i>v.</i> Crowan, Inhabit-	iii.	602
tants of		ants of	xvii.	64
— <i>v.</i> Catteral, Inhabit-		— <i>v.</i> Cumberworth Half,	vi.	682
ants of		Inhabitants of	v.	878
— <i>v.</i> Caudwell		— <i>v.</i> Cutler note (a)	ii.	731
— <i>v.</i> Chadwick		— <i>v.</i> Dalby	ii.	96
— <i>v.</i> Charlbury and		— <i>v.</i> Dale	v.	896
Walcott, Inhabitants of		— <i>v.</i> Darlington School,	xviii.	761
— <i>v.</i> Charlesworth		Governors of	ii.	745
— <i>v.</i> Charrette		— <i>v.</i> Dartmouth, Earl of	vii.	193
— <i>v.</i> Chatham, Inhabit-		— <i>v.</i> Dean		
ants of		— <i>v.</i> Deane		
— <i>v.</i> Chawton, Inhabit-		— <i>v.</i> Deighton		
ants of		— <i>v.</i> Denton		
— <i>v.</i> Chedgrave, Inhabit-		— <i>v.</i> Derbyshire, Inha-		
ants of		bitants of		
— <i>v.</i> Cheek		— <i>v.</i> — Jus-		
— <i>v.</i> Chelmsford, Church-		tices of		
wardens of		.		

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Regina v. Dixon	xv.	33	Regina v. Fall, In Error	i.	653
——— v. Dobson	vi.	637	——— v. Fenton	i.	480
——— v.	ix.	302	——— v. Fletcher (2 E. & B. 279)	xviii.	502
——— v. Doddington, Inhabitants of	i.	411	——— v. Flockton, Inhabitants of	ii.	535
——— v. Douglas	xiii.	42	——— v. Fontaine Moreau	xi.	1028
——— v. Dover, Mayor of	xi.	260	——— v. Fornett St. Mary, Inhabitants of	xiii.	160
——— v. In Error	xi.	277	——— v. Fouch	ii.	308
——— v. Downey	vii.	281	——— v. Fox	ii.	246
——— v. Dukinfield, Inhabitants of	xi.	678	——— v. Francis	xviii.	526
——— v. Dulwich College	xvii.	600	——— v. Gaskell	xvi.	472
——— v. Dunn	v.	959	——— v. Gilberdike, Inhabitants of	v.	207
——— v.	xii.	1026	——— v. Gilliard	xiii.	527
——— v. In Error	xii.	1031	——— v. Glamorganshire, Justices of	xiii.	561
——— v. Dyer	xiii.	851	——— v. Glossop, Inhabitants of	xiii.	117
——— v. Ealing, Inhabitants of note (a)	xii.	178	——— v. Gloucester, Mayor of	v.	862
——— v. East Ardsley, Inhabitants of	xiv.	793	——— v. Gomersal, Inhabitants of	xii.	76
——— v. Lancashire Railway Company	ix.	980	——— v. Gomertz	ix.	824
——— v. London Waterworks, Proprietors of	xviii.	705	——— v. Goole, Inhabitants of	xii.	172
——— v. —— Mark, Inhabitants of	xii.	877	——— v. Grand Junction Railway Company	iv.	18
——— v. —— Rainton, Inhabitants of note (a)	xi.	62	——— v. ——	v.	1006
——— v. —— Stonehouse, Inhabitants of	x.	230	——— v. Grant	xiv.	43
——— v. Inhabitants of	xii.	72	——— v. Great Bolton, Inhabitants of	vii.	387
——— v. —— Ville, Inhabitants of	i.	828	——— v. Great North of England Railway Company	ix.	315
——— v. Eastern Counties Railway Company	ii.	{ 347	——— v. Great Northern Railway Company	xiv.	25
——— v. Ecclesall Bierlow (11 A. & E. 607)	ii.	{ 569	——— v. Great Western Railway Company	iii.	333
——— v. Edye	xii.	698	——— v. ——	v.	597
——— v. Elhel, Inhabitants of	vii.	593	——— v. ——	vi.	179
——— v. Ellesmere, Inhabitants of	xii.	19	——— v. —— (Re Burnham Rates)	xiii.	327
——— v. Ellis	vi.	501	——— v. ——	xv.	{ 379
——— v. Elsley	xv.	1025	——— v. Greenaway	vii.	1083
——— v. Ely (Isle of), Inhabitants of	xv.	827	——— v. Greene	ii.	126
——— v. Eton College	viii.	526	——— v. ——	iv.	460
——— v. Evans, Steward of Manor of Witchford n. (b)	i.	355	——— v. ——	xvii.	646
——— v. Evenwood, and Barony, Inhabitants of	iii.	370	——— v. Gregory	vii.	793
——— v. Everist	x.	178	——— v. ——	viii.	274
——— v. Excise, Commissioners of	vi.	975	——— v. ——	viii.	508
——— v. Exeter, Recorder of	v.	342	——— v. Griffin	ix.	155
——— v. Fall	i.	636	——— v. Griffiths	xvii.	164
			——— v. Grimshaw	x.	747
			——— v. Halifax, Inhabitants of	xii.	111
			——— v. —— Road Trustees	xii.	448

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Regina v. Lechmere .	xvi.	284	Regina v. Londonderry and Coleraine Railway Company .	xiii.	998
— v. Ledgard, and others,	i.	616	— v. Long .	i.	740
Mayor &c. of Poole .	i.	616	— v. Longbottom .	xii.	816
— v. Leeds and Bradford Railway Company xviii.	343		— v. Longhorn .	xvii.	77
— v. — Inhabitants of v. { 907	916		— v. Longwood .	xiii.	116
— v. — ix. 910			— v. — Over-		
— v. — Mayor &c. of (11 A. & E. 512) .	i.	318	seers of .	xvii.	871
— v. — iv. 796			— v. Lord .	xii.	757
— v. — Recorder of note (a) ii. 547			— v. Lordsmere, Inha-	xv.	689
— v. — viii. 623			bitants of .		
— v. Leggatt .	xviii.	781	— v. Luton Roads, Trus-	i.	860
— v. Leicester, Deputies of Freemen of .	xv.	671	tees of .		
— v. Leicestershire, Justices of .	xv.	88	— v. Lydeard St. Lawrence, Inhabitants of (11 A. & E. 616) .	ii.	63
— v. Leith (1 E. & B. 121) .	xvii.	784	— v. Macclesfield, In-		
— v. Leominster, Inhabitants of .	v.	640	habitants of note (c) xi.	xii.	78
— v. Lichfield, Council of iv.	893		— v. —	xiii.	881
— v. — Mayor of i.	453		— v. Machen .	xiv.	74
— v. — ii. 693			— v. Madeley, Inhabit-		
— v. — In Error .	xvi.	781	ants of .	xv.	43
— v. — Town Council of .	x.	534	— v. Mallinson .	xvi.	367
— v. Lilleshall, Inhabitants of .	vii.	158	— v. Manchester and		
— v. Lindsey, Justices of xiii.	484		Leeds Railway Company,		
— v. Little Marlow, Inhabitants of .	x.	223	In Error .	iii.	528
— v. Liverpool, Recorder of .	xv.	1070	— v. — Council of .	ix.	458
— v. Llanelly, Inhabitants of .	xvii.	40	— v. — Inhabitants of .	viii.	572
— v. London, Brighton and South Coast Railway Company .	xv.	313	— v. — note .	xvii.	46
— v. — and Greenwich Railway Company .	iii.	166	— v. — Mayor &c. of .	v.	402
— v. — and North Western Railway Company xvi.	864		— v. — Over-	xvi.	449
— v. — and South Western Railway Company i.	558		seers of .		
— v. — Jus-	xii.	775	— v. Mansfield, Inhabit-	i.	444
— tices of .	ix.	41	ants of .		
— v. — note (c) xviii.	421		— v. Martin note (a) ii.	1037	
— v. — Lord Mayor of .	v.	555	— v. Marton cum Graf-		
— v. — xiii. 1			ton, Inhabitants of .	x.	971
			— v. Mylor, Inhabit-	xi.	55
			ants of .		
			— v. Mendham, Inhabit-	ix.	971
			ants of .		
			— v. Merionethshire, In-	vi.	343
			habitants of .		
			— v. — Jus-	vi.	163
			tices of .		
			— v. Merson .	iii.	895
			— v. Middlesex, Justi-		
			tices of .	iv.	807
			— v. — Pauper		
			Lunatic Asylum, Visiting		
			Justices of .	ii.	433
			— v. — Registers of vii.		
			156		

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Regina v. Prest .	xvi.	32	Regina v. St. Edmund's, Sa-	ii.	72
——— v. Preston .	xii.	816	isbury, Inhabitants of .	xvi.	1005
——— v. ——— E. (a)	xii.	891	——— v. St. George, Blooms-	xiii.	642
——— v. ——— Inhabi-	iv.	597	bury, Inhabitants of .		
——— v. Priest Hutton, In-	xvii.	59	——— v. Hanover Square, Inhabitants of		
habitants of .	xii.	168	——— v. Southwark, Case of Bethlem	x.	852
——— v. Priors Hardwick,	ix.	159	Hospital .	x.	859
Inhabitants of .	ix.	18	——— v. ——— Case of Bridewell Hospital	xiv.	571
——— v. Radnorshire, Jus-	xiii.	524	——— v. St. Giles, Camber-	xii.	13
tices of .	iv.	211	well, Inhabitants of .		
——— v. Ratcliffe Culey,			——— v. ——— Colches-		
Inhabitants of .			ter, Inhabitants of .		
——— v. Read .			——— v. without		
——— v. Reeve .			Cripplegate, Inhabitants	xvii.	636
——— v. Registrar of Joint	x.	839	of .	ii.	446
Stock Companies, In re	xiv.	327	——— v. ——— in the		
Sheffield and Rotherham	v.	926	Fields, Inhabitants of .		
Insurance Company .	xiv.	687	——— v. ———	ii.	458
——— v. Rhuddlan, Inhabi-	vii.	225	(St. Mary at Hill v. St.	v.	872
tants of .	ii.	476	Giles) . . .	vii.	529
——— v. Richards and	xvii.	466	——— v. . .	xi.	173
others .	vi.	153	——— v. St. John, Margate,	i.	252
——— v. Rigby .	ii.	557	Inhabitants of .	xvii.	474
——— v. Ripon, Inhabitants	iii.	776	——— v. St. James, West-	vi.	842
of .	vii.	574	minster, Governors of Poor	xiii.	964
——— v. Rishworth, Inha-	iii.	180	of . . .	xiv.	340
bitants of .	xvii.	671	——— v. St. Lawrence, Ap-		
——— v. Robinson .	iii.	143	pleby Inhabitants of .		
——— v. Rochester, Dean	xiii.	237	——— v. St. Leonard's,		
and Chapter of .	ix.	76	Shoreditch, Inhabitants of		
——— v. Rose .	vi.	78	——— v. . .		
——— v. Rotherham, Inha-	xvii.	746	——— v. St. Margaret, Leic-	ii.	559
tants of note (a) .	iv.	729	cester, Inhabitants of .	xii.	98
——— v. Rothwell, Inhabi-	vii.	241	——— v. . .	ii.	533
tants of note (a) .	vii.	245	Rochester, Inhabitants of .	vii.	569
——— v. Rowed .	viii.	561	——— v. . .	ix.	241
——— v. Rowlands .	ix.	878	Westminster, Inhabitants of .	xvii.	149
——— v. Rowley .	xii.	137	——— v. St. Martin, New	iii.	204
——— v. Russell .			Sarum, Inhabitants of .	vii.	587
——— v. Saffron Walden,			——— v. St. Martin's in the	xv.	399
Inhabitants of .			Fields, Guardians of .		
——— v. St. Andrew, Hol-			——— v. ——— In-		
born Governors &c. of			habitants of .		
——— v. ——— In-			——— v. St. Mary, Lam-		
habitants of .			beth, Guardians of .		
——— v. Worcester, Inha-			——— v. St. Mary-le-bone,		
bitants of .			Inhabitants of .		
——— v. St. Anne, West-			——— v. . .		
minster, Inhabitants of			(St. Mary-le-bone v. Bright-		
——— v. .			helmstone) . . .	xvi.	299
——— v. .					
——— v. St. Ebbe, Inha-					
tants of .					

REPORTED IN THE NEW SERIES.

[37]

Vol.	Page		Vol.	Page
Regina v. St. Mary-le-bone (St. Marylebone v. St. George)	xvi. 352	Regina v. Schlesinger — v. Scott note (a) ii.	x. 670 248	
— v. St. Mary in Bungay, Inhabitants of	xii. 38	— v. Scotton iii.	543	
— v. St. Mary, Newington, Inhabitants of	iv. 581	— v. Scriveners' Company iii.	493 939	
— v. —, Southampton, Inhabitants of	v. 513	— v. Seend, Inhabitants of	xii. 133	
— v. —, Whitechapel, Inhabitants of	xiv. 815	— v. Sevenoaks, Inhabitants of	vii. 136	
— v. St. Maurice, Inhabitants of	xii. 120	— v. Sewell viii.	161	
— v. St. Michael, Coventry, Inhabitants of	xvi. 908	— v. Shavington - cum-Gresty, Inhabitants of	xvii. 48	
— v. St. Olave's, Southwark, Inhabitants of	xii. 96	— v. Shaw xii.	419	
— v. St. Pancras, Inhabitants of	v. 912	— v. Shee iv.	2	
— v.	iii. 347	— v. Sheffield Canal Company xiii.	913	
— v.	v. 13	— v. — Inhabitants of xii.	93	
— v.	xii. 298	— v. Shepherd i.	170	
(St. Luke's v. St. Pancras)	xii. 129	— v. Sherburn, Inhabitants of note (a) ii.	545	
— v.	xii. 31	— v. Shiles i.	919	
(St. Pancras v. Lambeth)	xii. 4	— v. Skipperbottom x.	514	
— v.	v. 669	— v. Shipston - upon-Stour, Inhabitants of vi.	119	
— v. St. Paul, Covent Garden, Inhabitants of	vii. 232	— v. Shropshire, Justices of ii.	85	
— v.	vii. 533	— v. Silkstone, Inhabitants of ii.	520	
— v. St. Peter, Barton-upon-Humber, Inhabitants of	xvii. 630	— v. Sill (1 E. & B. 553) note (a) xviii.	756	
— v. St. Peter's, Droitwich, Inhabitants of	ix. 886	— v. Silversides, Error iii.	406	
— v. St. Sepulchre's, Inhabitants of	vi. 580	— v. Slawstone, Inhabitants of xviii.	388	
— v. St. Thomas, New Sarum, Inhabitants of	xii. 55	— v. Smith, D. vii.	543	
— v. Salford, Inhabitants of	xii. 106	— v. — xv.	614	
— v. —, Overseers of	xviii. 687	— v. Southampton Dock Company xiv.	587	
— v. Sanders	ix. 235	— v. — xvii.	83	
— v. Sandwich, Mayor &c. of	ii. 895	— v. — Inhabitants of xviii.	841	
— v.	x. 563	— v. — xv.	1043	
— v. Saunders	x. 484	— v. — Eastern Railway Company xv.	313	
— v. Savile	xviii. 703	— v. — Wales Railway Company xiii.	988	
— v. Scaife	xvii. 238	— v. — Sow, Inhabitants of iv.	93	
— v.	xviii. 773	— v. Spackman ii.	301	
— v. Scammonden, Inhabitants of	viii. 349	— v. Stacey xiv.	789	
		— v. Stamford, Council of note (a) iv.	900	

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Regina v. Stamford, Mayor &c. of . . .	vi.	433	Regina v. Totness Union, Guardians of . . .	vii.	690
——— v. Stamper . . .	i.	119	——— v. Tower Hamlets, Commissioners of Sewers for the . . .	iii.	670
——— v. Stamps, Commissioners of . . .	vi.	657	——— v. Townstal, Inhabitants of . . .	v.	357
——— v.	ix.	637	——— v. Trafford . . .	xv.	200
——— v. Stainforth, Inhabitants of . . .	xi.	66	——— v. Treasury Lords of (Queen Dowager's Annuity) . . .	xvi.	357
——— v. Staple Fitzpaine, Inhabitants of . . .	ii.	488	——— v. Turk . . .	x.	540
——— v. Stayley, Inhabitants of . . .	iii.	357	——— v. Turweston, Inhabitants of . . .	xvi.	109
——— v. Stockley . . .	iii.	238	——— v. Tyrwhitt . . .	xii.	292
——— v. Stockton, Inhabitants of . . .	vii.	520	——— v.	xv.	249
——— v. Stoke Bliss, Inhabitants of . . .	vi.	158	——— v. Upton, St. Leonard's, Inhabitants of . . .	x.	827
——— v. ——upon-Trent, Inhabitants of . . .	v.	303	——— v. Vange, Inhabitants of . . .	iii.	242
——— v. Stoneleigh, Inhabitants of . . .	ii.	530	——— v. Vickeray . . .	xii.	478
——— v. Stowell . . .	v.	44	——— v. Victoria Park Company	i.	288
——— v. Stowford, Inhabitants of . . .	ii.	526	——— v. Walbottle, Inhabitants of . . .	ix.	248
——— v. Street . . .	xviii.	682	——— v. Waldegrave, Earl . . .	ii.	341
——— v. Suffolk, Justices of . . .	ii.	85	——— v. Walton . . .	ii.	969
——— v.	xviii.	416	——— v. Warwick, Council of . . .	viii.	926
——— v. Surrey, Justices of . . .	v.	506	——— v. Warwickshire, Justices of . . .	vi.	750
——— v.	ix.	37	——— v. Watford, Inhabitants of . . .	ix.	626
——— v.	xiv.	684	——— v. Waverton, Inhabitants of . . .	xvii.	562
——— v. Sutcliffe . . .	xiii.	833	——— v. Weedon Beck, Lords, &c., of . . .	xiii.	808
——— v. Tacolnestone, Inhabitants of . . .	xii.	157	——— v. Wellington, Inhabitants of . . .	xi.	65
——— v. Tetbury (11 A. & E. 615), note (a) i.	i.	698	——— v. West note (a) i.	i.	826
——— v. Thomas . . .	iii.	589	——— v. Westbrook . . .	x.	178
——— v. Thompson . . .	v.	477	——— v. Westbury, Inhabitants of . . .	v.	500
——— v.	xvi.	832	——— v. Westhoughton, Inhabitants of . . .	v.	300
——— v. Tinsley, Inhabitants of . . .	xiii.	933	——— v. West Riding, Justices of, In re Lees . . .	i.	325
——— v. Tipton, Inhabitants of . . .	iii.	215	——— v.	i.	624
——— v. Tithe Commissioners . . .	xiv.	459	——— v. (Longwood v. Halifax)	ii.	705
——— v.	xv.	620	——— v. (Drighlington v. Pudsey) . . .	ii.	506
——— v. Tithe Commissioners of England and Wales, Re Hale Tithes . . .	xviii.	156			
——— v. Todmorden, Overseers of . . .	i.	185			
——— v. Tordoft . . .	v.	933			
——— v. Totley, Inhabitants of . . .	vii.	596			
——— v. Totness, Inhabitants of . . .	xi.	80			

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Robarts v. Tucker, In Error	xvi.	560	Rossi, Lowley v.	xii.	952
Robbins v. Fennell	xi.	248	Rotheram, Bold v.	viii.	781
— v. Heath note (c)	xi.	257	Rotherfield, Overseers of, Hartfield, Overseers of, v.	xvii.	746
Roberts v. Hunt	xv.	17	Rotherham, Inhabitants of, Regina v. . note (a) ii.	ii.	557
Robertson v. Norris	xi.	916	— v. iii.	776	
— v. Struth	v.	941	Rothschild v. Currie	i.	43
Robin, Jones v.	x.	581	Rothwell, Inhabitants of, Regina v. . note (a) vii.	vii.	574
— v., In Error	x.	620	Rotton v. Inglis	ii.	667
Robins, Hunt v.	iii.	300	Rouch v. Great Western Railway Company	i.	51
— v. Viscount Maidstone	iv.	811	Rowed, Regina v.	iii.	180
Robinson, Guardians of Ban- bury Union v.	iv.	919	Rowland v. Blaksley	i.	403
— v. Hawksford	ix.	52	Rowlands, Regina v.	xvii.	671
— v. Little	ix.	602	— v. Samuel	xi.	39
— v. Mainwaring	x.	274	Rowles v. Senior	viii.	677
— v. Marchant	vii.	918	Rowley, Regina v.	iii.	143
— v. Mayfield	vii.	486	— v. The Queen, In Error	vi.	668
— v. Regina v.	xvii.	466	Royal Exchange Assurance Company, Alcock v.	xiii.	292
— v. Reynolds, In Error	ii.	196	— v. McSwiney v.	xiv.	634
— v. Simpson v.	xii.	511	Error	xiv.	646
— v. Thorogood v.	vi.	769	Royle, Doe dem. Patrick v.	xiii.	100
— v. Todmorden Union, In Error	iii.	675	Ruck, Gregson v.	iv.	737
— v. Waddington	xiii.	753	Rugeley, Churchwardens and Overseers of, Doe dem. Marquis of Angle- sey v.	vi.	107
— v. Ward v.	viii.	920	Rules of Court	ii.	245
— v. Wilson v.	vii.	68	— v.	iv.	653
Robson v. Curlewis	ii.	421	— v.	viii.	630
— v. Oliver	x.	704	— v.	viii.	633
Rochdale Canal Company v. King	xiv.	122	— v.	viii.	638
King, In Error	xiv.	136	— v.	ix.	599
King, In Error	v.	— v.	Rumball v. Munt	viii.	382
Radcliffe	xviii.	287	Rumbelow v. Whalley	xvi.	397
Rochester, Dean and Chap- ter of, Regina v.	xvii.	1	Rundle v. Little	vi.	174
Roden v. Ryde	iv.	626	Rusham, Doe d. Newman v.	xvii.	723
Roe, Doe dem. Hudson v.	xviii.	806	Rushworth v. Taylor	iii.	699
— v. Snape v. Ne- vill	xii.	466	Rusk, Baker v.	xv.	870
— v. Parr v.	i.	700	Russell, Ellis v.	x.	962
Roffey v. Henderson	xvii.	574	— v. Huntley v.	xiii.	572
Rogers v. Brenton	x.	26	— v. Phillips	xiv.	891
— v. Custance	i.	77	— v. Regina v.	xiii.	237
— v. Driver	xvi.	102	— v. Shenton	iii.	449
— v. Grazebrook	viii.	895	— v. Smith	xii.	217
— v. Kennay	ix.	592	— v. Veitch v.	iii.	928
Rolf, Taylor v.	v.	337	Rutland, Duke of, v. Bag- shaw	xiv.	869
Rolfe v. Learmouth	xiv.	196	Rylls v. The Queen, In Error	xi.	781
Roscorla v. Thomas	iii.	234	— v. Exch. Ch.	xi.	795
Rose D.D., Ex parte	xviii.	751			
— v. Regina v.	vi.	153			
— Whyte v., In Error	iii.	493			
Rosher, Freeman v.	xiii.	780			
Ross v. Clifton (11 A. & E. 631)	i.	698			

REPORTED IN THE NEW SERIES.

[41]

	Vol.	Page		Vol.	Page
Ryan v. Clark	xiv.	65	St. Leonard's, Shoreditch, Inhabitants of, Regina v.	xiii.	964
— v. Sams	xii.	460	Inhabitants of, Regina v.	xiv.	340
Ryde, Roden v.	iv.	626	St. James, Westminster, Go- vernors of Poor of, Re- gina v.	xvii.	474
S.			St. Katherine's Dock Com- pany v. Higgs	x.	641
Saffron Walden, Inhabitants of, Regina v.	ix.	76	St. Margaret, Leicester, In- habitants of, Regina v.	ii.	559
St. Andrew, Holborn, Inha- bitants of, Regina v.	xvii.	746	Inhabitants of, Regina v.	xii.	98
Gover- nors, &c., of, Regina v.	vi.	78	Rochester, Inhabitants of, Regina v.	ii.	533
Worcester, In- habitants of, Regina v.	iv.	729	Westminster, Inhabitants of, Regina v.	vii.	569
St. Anne, Westminster, In- habitants of, Regina v.	vii.	241	St. Martin's-in-the-Fields, Inhabitants of, Regina v.	iii.	204
— v. St. Leonard, Shoreditch	viii.	561	Guar- dians of, Regina v.	xvii.	149
St. Ebbes, Inhabitants of, Re- gina v.	vii.	245	St. Martin, New Sarum, Inhabitants of, Regina v.	ix.	241
St. Edmunds, Salisbury, In- habitants of, Regina v.	xii.	137	St. Mary, Bungay, Inhabit- ants of, Regina v.	xii.	38
St. George, Bloomsbury, In- habitants of, Regina v.	ii.	72	Lambeth, Guar- dians of, Regina v.	vii.	587
— Hanover Square, Inhabitants of, Regina v.	xvi.	1005	Newington, Inha- bitants of, Regina v.	iv.	581
— Southwark, Re- gina v., Case of Bethlem Hospital	xiii.	642	Southampton, In- habitants of, Regina v.	v.	513
Re- gina v., Case of Bridewell Hospital	x.	852	Re- gina v.	xiv.	813
St. Giles, Camberwell, Inha- bitants of, Regina v.	x.	859	Whitechapel, In- habitants of, Regina v.	xii.	120
— Colchester, Inha- bitants of, Regina v.	xiv.	571	St. Marylebone, Inhabitants of, Regina v.	xv.	399
— without Crippe- gate, Inhabitants of, Re- gina v.	xii.	13	Inhabitants of, Regina v. (St. Mary- lebone v. Brightelmston)	xvi.	299
— in-the-Fields, In- habitants of, Regina v.	xvii.	636	Inhabitants of, Regina v. (St. Mary- lebone v. St. George)	xvi.	352
— v. (St. Mary-at-Hill v. St. Giles)	ii.	446	Inhabitants of v. St. Pancras	xvi.	971
In- habitants of, Regina v.	ii.	458	St. Maurice, Inhabitants of, Regina v.	xvi.	908
In- habitants of, Regina v.	vii.	529	St. Michael, Coventry, In- habitants of, Regina v.	xii.	96
In- habitants of, Regina v.	v.	872	St. Neot's Union, Sanders v.	viii.	810
In- habitants of, Regina v.	xi.	173	St. Nicholas, Deptford, Churchwardens of, v.	viii.	394
(St. Giles-in-the-Fields v. St. Mary, Lambeth)	ii.	364	Sketchley	v.	912
St. Helen's Railway Com- pany, Doe dem. Myatt v.	i.	252	St. Olave's, Southwark, In- habitants of, Regina v.	iii.	347
St. John, Margate, Inhabit- ants of, Regina v.	vi.	842	St. Pancras, Inhabitants of, Regina v.		

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
St. Pancras, Inhabitants of, Regina v. .	v.	13	Sarum, New, Inhabitants of, Regina v. .	vii.	941
_____, Inhabitants of, Regina v. .	xii.	298	Satchell, Earp v. .	iv.	121
_____, Inhabitants of, Regina v. (St. Luke v. St. Pancras) .	xii.	129	Saunders, Regina v. .	x.	484
_____, Inhabitants of, Regina v. (St. Pancras v. Lambeth) .	xii.	81	Savile, Regina v. .	xviii.	703
_____, Inhabitants of, Regina v. (St. Pancras v. St. John's, Hackney) .	xii.	74	Savage, Doe dem. Blayney v. .	iv.	416
_____, v. St. Maryle- bone .	xvi.	971	Sawie, Crease v., In Error	ii.	862
St. Paul's, Dean of, Vigers v.	xiv.	909	Sawyer, In re .	ii.	721
_____, Covent Garden, Inhabitants of, Regina v.			Sayer v. Dufaur .	ix.	800
_____, Inhabitants of, Re- gina v. .	note v.	669	_____, v. .	xi.	825
_____, v. .	vii.	232	_____, Herbert v. .	v.	965
St. Peter's, Barton - upon - Humber, Inhabitants of, Regina v. .	xvii.	630	Sayles v. Blane .	xiv.	205
_____, Droitwich, In- habitants of, Regina v. .	ix.	886	_____, Dunn v. .	v.	685
St. Sepulchre's, Inhabitants of, Regina v. .	vi.	580	Scadding v. Eyles .	ix.	858
St. Thomas, New Sarum, In- habitants of, Regina v. .	xii.	55	_____, v. Lorant .	xiii.	687
Salford, Inhabitants of, Re- gina v. .	xii.	106	_____, v., In Error .	xiii.	706
_____, Overseers of, Re- gina v. .	xviii.	687	Scaife, Regina v. .	xvii.	298
Salters' Company v. Jay	iii.	109	_____, v. .	xviii.	773
Salmon, Webb v. .	xiii.	886	Scammonden, Inhabitants of, Regina v. .	viii.	349
_____, v. -- In Error	xiii.	894	Scarborough, Branscombe v. .	vi.	13
Salisbury, Marquis of, v. Great Northern Railway Company .	xvii.	840	Scarpellini v. Atcheson .	vii.	864
Salter, Purchell v. .	i.	197	Scattergood v. Sylvester .	xv.	506
_____, v., In Error	i.	209	Schlesinger, Regina v. .	x.	670
Sambourne, Belcher v. .	vi.	414	Schmaltz v. Avery .	xvi.	655
Sams, Ryan v. .	xii.	460	Schmidt, D'Ebro v. .	xiii.	653
Samuel v. Green .	x.	262	Schofield v. Corbett .	xi.	779
_____, Lewis v. .	viii.	685	Scott, Harvey v. .	xi.	92
_____, v. Nettleship .	iii.	188	_____, v. Parker .	i.	809
_____, Rowlands v. .	xi.	39	_____, v. Regina v. .	note (a) ii.	248
Sanders v. St. Neot's Union	viii.	810	_____, v. .	iii.	543
_____, Regina v. .	ix.	235	Scotton, Regina v. .	v.	493
_____, v. Vanzeller .	iv.	260	Scott v. Van Sandau .	i.	102
Sandwich, Mayor &c. of, Regina v. .	ii.	895	_____, v. .	vi.	237
_____, Mayor &c. of, v.			_____, v. Wedlake. In Error .	vii.	766
The Queen, In Error	x.	571	Screech, Peake v. .	vii.	603
_____, Regina v. .	x.	563	Scriveners' Company v. Brooking .	iii.	95
Sandys v. Sandys note (b)	i.	316	_____, Regina v. .	iii.	939
			Scroope, Homfray v. .	xiii.	509
			Seend, Inhabitants of, Re- gina v. .	xii.	133
			Selby v. Browne .	vii.	620
			Sellwood, Lock v. .	i.	736
			_____, Mount v. .	i.	726
			Senior, Rowles v. .	viii.	677
			Sevenoaks, Inhabitants of, Regina v. .	vii.	136
			Severin v. Leicester .	xiii.	949
			Sewell v. Evans .	iv.	626
			_____, Regina v. .	viii.	161
			Sewers, Commissioners of, for the Tower Hamlets, Regina v. .	iii.	670
			Seymour, Caudle v. .	i.	889
			_____, v. Maddox .	xvi.	326
			Share, King v. .	iii.	31

REPORTED IN THE NEW SERIES.

[43]

	Vol.	Page		Vol.	Page
Sharland, Marshall <i>v.</i>	xv.	1051	Simms <i>v.</i> Henderson	xi.	1015
Sharpe <i>v.</i> Bluck	x.	280	Simons, Johns <i>v.</i>	ii.	425
Sharwood, Furze <i>v.</i>	ii.	388	—— <i>v.</i> Lloyd	vii.	402
Shavington-cum-Gresty, In- habitants of, Regina <i>v.</i>	xvii.	48	Simpson, Forth <i>v.</i>	xiii.	680
Shaw, Churchwardens of Birmingham <i>v.</i>	x.	868	—— Litchfield, Mayor of, <i>v.</i> viii.	65	
—— Lawes <i>v.</i>	v.	322	—— <i>v.</i> Margitson	xi.	23
—— Regina <i>v.</i>	xii.	419	—— <i>v.</i> Paull	ix.	365
—— <i>v.</i> York and North Midland Railway Co.	xiii.	347	—— <i>v.</i> Ramsay	v.	371
Shee, Regina <i>v.</i>	iv.	2	—— <i>v.</i> Robinson	xii.	511
Sheffield Canal Company, Regina <i>v.</i>	xiii.	913	Sims <i>v.</i> Marryatt	xvii.	281
—— Inhabitants of, Regina <i>v.</i>	xii.	93	Skene, Gaskill <i>v.</i>	xiv.	664
Shenton <i>v.</i> James	v.	199	Skelton, Halstead <i>v.</i> , In Error	v.	86
——, Russell <i>v.</i>	iii.	449	Sketchley, St. Nicholas, Deptford, Churchwar- dens of, <i>v.</i>	viii.	394
Shepherd <i>v.</i> Hodzman	xviii.	316	Skewes, Bickford <i>v.</i>	i.	938
—— <i>v.</i> Londonderry, Marquis of	xviii.	145	Skilbeck <i>v.</i> Garbett	vii.	846
—— Regina <i>v.</i>	i.	170	Slack <i>v.</i> Clifton	viii.	524
Shepperton, Hutchinson <i>v.</i>	xiii.	955	Slade, Gardner <i>v.</i>	xiii.	796
Sherburn, Inhabitants of, Regina <i>v.</i> note (a)	xii.	955	—— Perry <i>v.</i>	viii.	115
Shervill, Phillips <i>v.</i>	vi.	645	Slater <i>v.</i> Ashton-under-Lyne, Mayor &c. of	xviii.	398
Shiles, Regina <i>v.</i>	i.	919	—— <i>v.</i> Hodgson	ix.	727
Shilson, Keppel <i>v.</i>	iv.	914	Slawstone, Inhabitants of, Regina <i>v.</i>	xviii.	388
Shinner, Palk <i>v.</i>	xviii.	668	Sleeman, Doe dem. Moles- worth <i>v.</i>	ix.	298
Shinton, Tyler <i>v.</i>	viii.	610	Sligo and Shannon Railway Company, Mackenzie <i>v.</i>	xviii.	862
Shipperbottom, Regina <i>v.</i>	x.	614	Small <i>v.</i> Gibson	xvi.	128
Shipston-upon-Stour, Inha- bitants of, Regina <i>v.</i>	vi.	119	—— <i>v.</i> — In Error	xvi.	141
Shore, Barnes <i>v.</i>	viii.	640	—— <i>v.</i> Nairne	xiii.	840
Short <i>v.</i> Stone	viii.	358	Smallwood, Blakesley <i>v.</i>	viii.	538
Shrewsbury and Birming- ham Railway Company <i>v.</i> London and North West- ern Railway Company	xvii.	652	Smaridge, Doe dem. Clarke <i>v.</i>	vii.	957
Shropshire, Justices of, Re- gina <i>v.</i>	ii.	85	Smith, Bacon <i>v.</i>	i.	845
Shuttleworth's Case	ix.	651	—— <i>v.</i> Ball	ix.	361
Sidebottom, Bostock <i>v.</i>	xviii.	813	—— <i>v.</i> Bird	xii.	786
—— <i>v.</i> — In Error	xviii.	829	—— <i>v.</i> Braine	xvi.	244
Siely, Heseltine <i>v.</i>	xviii.	443	—— <i>v.</i> Carr	v.	128
Sievwright <i>v.</i> Archibald	xvii.	103	—— <i>v.</i> Clench	ii.	835
Silkstone, Inhabitants of, Re- gina <i>v.</i>	ii.	520	—— <i>v.</i> Day	xv.	584
Sill, Regina <i>v.</i> (1 E. & B. 553) note (a)	xviii.	736	—— <i>v.</i> Dickenson	v.	602
Silverlock, Hoare <i>v.</i>	xii.	624	—— <i>v.</i> Gabriel	xvi.	847
Silversides, Regina <i>v.</i> , In Error	iii.	406	—— <i>v.</i> Goldsworthy	ii.	717
Simmonds, King <i>v.</i> , In Er- ror	vii.	289	—— <i>v.</i> —	iv.	430
Simmons <i>v.</i> Wood	v.	170	—— <i>v.</i> Hopper	ix.	1005
			—— <i>v.</i> Houlden	xiv.	841
			—— <i>v.</i> Martindale	i.	389
			—— <i>v.</i> Montague	xvii.	688
			—— <i>v.</i> Parkes	xv.	297
			—— <i>v.</i> The Queen, In Error	xiii.	738
			—— <i>v.</i> Regina	v.	614
			—— <i>v.</i> D., Regina	vii.	543
			—— <i>v.</i> Russell	xii.	217

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Smith v. Thorne	xviii.	134	Stamps, Commissioners of, Regina v.	vi.	657
_____, Wearing v.	ix.	1024	_____. Re-gina v.	ix.	637
Smithies, Green v.	i.	796	Stainforth, Inhabitants of, Regina v.	xi.	66
Smyth, Betts v.	ii.	113	Standen v. Chrismas	x.	135
Snaith, Leeming v.	xvi.	275	Stanford, Ex parte	i.	886
_____. Overseers of Wig-ton, Overseers of, v.	xvi.	496	Stanley, Bingham v.	ii.	117
Soares v. Glyn	viii.	24	_____. Lobb v.	v.	574
Solomon v. Lawson	viii.	823	_____. v. Hayes	iii.	105
Somerton, Doe dem. Flem-ing v.	vii.	58	Staple Fitzpaine, Inhabitants of, Regina v.	ii.	488
Southampton Dock Com-pany, Regina v.	xiv.	587	Stapleton v. Crofts	xviii.	367
_____. Re-gina v.	xvii.	83	Staunton v. Wood	xvi.	638
_____. Inhabitants of, Regina v.	xviii.	841	Staveley v. Allcock	xvi.	636
South Devon Railway Com-pany, Regina v.	xv.	1043	Stayley, Inhabitants of, Re-gina v.	iii.	357
_____. Worsley v.	xvi.	539	Steavenson v. Corporation of Berwick	i.	154
_____. Eastern Railway Com-pany Regina v.	xv.	313	Steele, Doe dem. Timmis v.	iv.	663
_____. v.	xvii.	485	_____. v. Hoe	xiv.	431
The Queen, In Error	xvii.	485	_____. Pipe v.	ii.	733
Wales Railway Com-pany Regina v.	xiii.	988	Steer, Green v.	i.	707
_____. Re-gina v.	xiv.	902	Steggall, Freeman v.	xiv.	202
Sow, Regina v.	iv.	93	Stendall, Taylor v.	vii.	634
Spackman, Regina v.	ii.	301	Stephens v. De Medina	iv.	422
Spain, Queen of, Wads-worth v.	xvii.	171	_____. Doe dem. Lord Egremont v.	vi.	208
Spalding, De Bernardy v.	iv.	823	_____. Hart v.	vi.	937
Speakman's Case note (a) i.	965		_____. Pike v.	xii.	465
Spedding, Latham v.	xvii.	440	Stevens v. Jeacocke	xi.	731
Speller, Chapman v.	xiv.	621	Steward, Francis v.	v.	984
Spence v. Chodwick	x.	517	Stewart v. Anglo Californian Gold Mining Company	xviii.	736
Spencer, Charleton v.	iii.	693	_____. Todd v.	ix.	759
Spicer v. Cooper	i.	424	_____. v. Todd, In Error	ix.	767
_____. Webb v.	xiii.	886	Strickland v. Mansfield	viii.	675
_____. v. In Error	xiii.	894	Stiven, Williams v.	ix.	14
Spilsbury v. Clough	ii.	466	Stockbridge v. Sussams	iii.	239
Spooner and Payne, In re	xi.	136	Stockley, Regina v.	iii.	238
Squire, Beaumont v.	xvii.	905	Stockton, Inhabitants of, Regina v.	vii.	520
_____. v. Huetsen	i.	308	Stoke Bliss, Inhabitants of, Regina v.	vi.	158
Stables, Pollock v.	xii.	765	_____. upon Trent, Inhabitants of, Regina v.	v.	303
Stackwood v. Dunn	iii.	822	Stone, Collis v.	iv.	655
Stacy, Pollock v.	ix.	1033	_____. Short v.	viii.	358
Stacey, Regina v.	xiv.	789	Stonehewer v. Farrar	vi.	730
Stamford, Council of, Regina r.	note (a) iv.	900	Stonehouse v. Gent note (a) ii.	ii.	431
_____. Mayor, &c. of, Re-gina v.	vi.	433	Stoneleigh, Inhabitants of, Regina v.	ii.	530
_____. Earl of, Lowndes v.	xviii.	425	Story, Nathan v.	xii.	956
Stamp v. Sweetland	viii.	13	Stowell, Hearne v. (12 A. & E. 727)	ii.	423
Stamper, Regina v.	i.	119	_____. Regina v.	v.	44

REPORTED IN THE NEW SERIES.

[45]

	Vol.	Page		Vol.	Page
Stowford, Inhabitants of, Regina v.	ii.	526	Tapster, Dundalk Western Railway Company v.	i.	667
Strand Union, Guardians of, Paine v.	viii.	326	Tarleton, Jacobs v.	x.	421
Street, Regina v.	xviii.	682	——— v. Liddell	xvii.	390
Stretton, Nicholls v.	x.	346	Tassell, Wood v.	vi.	234
Strick, Coles v.	xv.	2	Tattersall, Foster v.	n. (a)	212
Strickland, Doe dem. Rayer v.	ii.	792	Taunton, Doe dem. Howe v. note (b)	xvi.	117
——— v. Mansfield	viii.	675	Taylor v. Clay	ix.	713
Stronghill v. Buck!	xiv.	781	——— and the Chancellor, &c. of Oxford, In re	i.	952
Struth, Robertson v.	v.	941	——— v. Clemson, In Error	ii.	978
Stubbs, Flather v.	ii.	614	——— Doe dem. Harris v.	x.	718
Sturgis, Welchman v.	xiii.	552	——— v. Hawkins	xvi.	308
Sturt, Blagg v.	x.	899	——— Reece v. note (h)	xi.	318
Stutz, Greville v.	x.	906	——— Rolf v.	v.	337
——— v. Wyatt	vi.	666	——— Rushworth v.	iii.	699
Suffolk, Justices of, Re- gina v.	ii.	85	——— v. Stendall	vii.	634
Re-			——— Tetley v. (1 E. & B. 521)	xvii.	645
gina v.	xviii.	416	——— v. (1 E. & B. 521, 532)	xviii.	813
Sullivan, Arden v.	xiv.	832	——— v. Tracey	iii.	966
Sunderland Marine Assu- rance Company v. Kearney	xvi.	925	——— Williamson v.	v.	175
Surrey, Justices of, Regina v.	v.	506	Tearle, Yates v.	vi.	282
——— v.	ix.	37	Temperley, Martin v.	iv.	298
——— c.	xiv.	684	——— Willding v.	xi.	987
Surridge, Cutts v.	ix.	1015	Tennant v. Bell	ix.	684
Sussams, Stockbridge v.	iii.	239	——— v. Cranston	viii.	707
Sutcliffe, Regina v.	xiii.	833	Tetbury, Regina v. (11 A. & E. 615, note (a))	i.	698
Swabey, Dewar v. (11 A. & E. 913)	ii.	71	Tetley v. Taylor (1 E. & B. 521)	xvii.	645
Swansea, Mayor, &c. of, Hall v.	v.	526	——— v. —— (1 E. & B. 521, 532)	xviii.	813
——— Waterworks Com- pany, Eaton v.	xvii.	267	Tew v. Harris	xi.	7
Sweet, Moss v.	xvi.	493	Tewson, Lane v. (12 A. & E. 116, note (a))	ii.	264
Sweetland, Stamp v.	viii.	13	Thame v. Boast note (a)	xii.	808
Syderff v. The Queen, In Error	xii.	245	Thanet, Earl of, Waters v.	ii.	757
Symonda, Dawson v.	xii.	830	Theelluson, Mardall v.	xviii.	857
——— Richards v.	viii.	90	Thetford, Mayor of, v. Tyler	viii.	95
Sylvester, Scattergood v.	xv.	506	Thomas, Alexander v.	xvi.	333
T.			——— Higgins v.	viii.	908
Tacolnstone, Inhabitants of, Regina v.	xii.	157	——— v. Fredericks	x.	775
Tallis v. Tallis (1 E. & B. 397) note (a)	xviii.	415	——— Regina v.	iii.	589
Talmon, Reynolds v.	ii.	644	——— Roscorla v.	iii.	234
Tancred, Leyland v.	xvi.	664	——— v. Thomas	ii.	851
——— v. Leyland, In Er- ror	xvi.	669	Thompson v. Becke	iv.	759
Taniere, Doe dem. Renning- ton v.	xii.	998	——— Brune v.	iv.	543
Tanner v. Moore	ix.	1	——— v.	ii.	789
			——— Doe dem. Dand v.	vii.	897
			——— Lord	xiii.	670
			Downe v.	ix.	1037
			——— Lord Downe v.	ix.	1037
			——— Ex parte	vi.	721
			——— v. Hornby	ix.	978

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page
Thompson <i>v.</i> Ingham	xiv.	710	Totness Union, Guardians of,	vii.	690
——— Jackson <i>v.</i>	ii.	887	Regina <i>v.</i> . . .		
——— <i>v.</i> Nye	xvi.	175	Tower Hamlets, Commissioners of Sewers of, Regina <i>v.</i>	iii.	670
——— <i>v.</i> Pettitt	x.	101	——— Hamlets, Commissioners of Sewers for, Regina <i>v.</i>	v.	357
——— Regina <i>v.</i>	v.	477	Towers <i>v.</i> Newton . . .	i.	319
——— <i>v.</i>	xvi.	832	Towgood, Anderson <i>v.</i> . . .	i.	245
——— <i>v.</i> Whatley	xvi.	189	Towne, Delisser <i>v.</i> . . .	i.	333
——— <i>v.</i> Wood	iv.	493	Townstall, Inhabitants of, Regina <i>v.</i> . . .	iii.	357
Thorne, Fancourt <i>v.</i>	ix.	312	Tracey <i>v.</i> Taylor . . .	iii.	966
——— <i>v.</i> Neal	ii.	726	Trafford, Regina <i>v.</i> . . .	xv.	200
——— Smith <i>v.</i>	xviii.	134	Treasury, Lords of, Regina <i>v.</i> . . .		
——— Trix <i>v.</i>	ix.	282	——— (Queen Dowager's An-	xvi.	357
Thornton, Anderson <i>v.</i>	iii.	271	nuity) . . .		
Thorogood <i>v.</i> Robinson	vi.	769	Tresidder, Doe dem. Tresidder <i>v.</i> i.		416
Tibbett, Morton <i>v.</i>	xv.	428	Trevanion, Walsh <i>v.</i> . . .	xv.	733
Tillinghast, Drummond <i>v.</i>	xvi.	740	Trickett, Grange <i>v.</i> (2 E. & B. 395)	xvii.	574
Timmins <i>v.</i> Gibbins	xviii.	722	Trinity House, Hull, Guild		
Timms <i>v.</i> Williams	iii.	413	of, <i>v.</i> Beadle . . .	xiii.	175
Tinker, Clarke <i>v.</i>	x.	604	Trix <i>v.</i> Thorne . . .	ix.	282
Tinsley, Inhabitants of, Regina <i>v.</i>	xiii.	933	Tucker, Robarts <i>v.</i> , In Error	xvi.	560
Tipton, Inhabitants of, Regina <i>v.</i>	iii.	215	Turk, Regina <i>v.</i> . . .	x.	540
Tithe Commissioners, The, Regina <i>v.</i>	xiv.	459	Turner <i>v.</i> Ambler . . .	x.	252
——— Commissioners of, Regina <i>v.</i>	xv.	620	——— Andrews <i>v.</i> . . .	iii.	177
——— Commissioners of England and Wales, Re Hale Tithes, Regina <i>v.</i>	xviii.	156	——— Bates . . .	x.	292
Tobacco Pipe Makers' Company <i>v.</i> Loder	xvi.	765	——— Harrison <i>v.</i> . . .	x.	482
Toby, Re	xii.	694	——— Holloway <i>v.</i> . . .	vi.	928
Toby, Woolmer <i>v.</i>	x.	691	——— Padwick <i>v.</i> . . .	xi.	124
Todd <i>v.</i> Stewart	ix.	759	——— Van Sandau <i>v.</i> . . .	vi.	773
——— Stewart <i>v.</i>	ix.	769	Turner's Case . . .	ix.	80
Todmorden, Overseers of, Regina <i>v.</i>	i.	185	Turrill <i>v.</i> Crawley . . .	xiii.	197
——— Union, Robin-			Turweston, Inhabitants of, Regina <i>v.</i> . . .	xvi.	109
son <i>v.</i> , In Error	iii.	675	Twentyman, Bell <i>v.</i> . . .	i.	766
Toke, Wray <i>v.</i>	xii.	492	Twycross <i>v.</i> King . . .	vi.	663
Tolhurst <i>v.</i> Notley	xi.	406	Tyler <i>v.</i> Shinton . . .	viii.	610
Toller <i>v.</i> Attwood	xv. {	929	——— <i>v.</i> Thetford, Mayor of	viii.	95
Tollerton, Overseers of, Ex parte		1084	Tynte <i>v.</i> The Queen, In Error	vii.	216
Tom, Doe dem. Snell <i>v.</i>	iii.	792	Tyrwhitt, Regina <i>v.</i> . . .	xii.	292
Tomlinson <i>v.</i> Bolland	iv.	615	——— Regina <i>v.</i> . . .	xv.	249
Tonkin, Cooke <i>v.</i>	iv.	642			
Toppin <i>v.</i> Field	ix.	936	U.		
Tordoff, Regina <i>v.</i>	iv.	386	Underhill, Peardon <i>v.</i>	xvi.	120
Torkington, Beadsworth <i>v.</i>	v.	933	Ulph, Doe dem. Darlington <i>v.</i>	xiii.	204
Torrence <i>v.</i> Gibbins	i.	782	University College <i>v.</i> Garton	x.	760
Totley, Inhabitants of, Regina <i>v.</i>	v.	297	Upcher, Martins <i>v.</i>	iii.	662
Totness, Inhabitants of, Regina <i>v.</i>	vii.	596	Upton St. Leonards, Inhabitants of, Regina <i>v.</i> . . .	x.	827
	xi.	80	Usher <i>v.</i> Walters . . .	iv.	553

REPORTED IN THE NEW SERIES.

[47]

V.	Vol.	Page	Vol.	Page	
<i>Van Boven's Case</i>	ix.	669	<i>Walker, Morris v.</i>	xv.	589
<i>Vange, Inhabitants of, Regina v.</i>	iii.	242	<i>Walker, Durham and Sunderland Railway Company v., In Error</i>	ii.	940
<i>Van Sandau, Scott v.</i>	i.	102	— v. <i>London and Blackwall Railway Company</i>	iii.	744
— v. <i>Turner</i>	vi.	237	— v. <i>Mellor</i>	xi.	478
<i>Vanzeller, Sanders v.</i>	iv.	260	<i>Walley v. Mc Connell</i>	xiii.	903
<i>Valpy v. Oakeley</i>	xvi.	941	<i>Wall, Laforest v.</i>	ix.	599
<i>Vaughan, Bromage v.</i>	ix.	608	<i>Walsh v. Trevanion</i>	xv.	733
— v. <i>Matthews</i>	xiii.	187	<i>Walter v. De Richemont</i>	vi.	544
— v. <i>Pemberton</i>	x.	87	<i>Walters, Usher v.</i>	iv.	553
<i>Veale, Garbett v.</i>	v.	408	<i>Waltham, Fisher v.</i>	iv.	889
<i>Veitch v. Russell</i>	iii.	928	<i>Walther v. Mess</i>	vii.	189
<i>Veley v. Burder (7 A. & E. 265)</i>	i.	387	<i>Walton, Regina v.</i>	ii.	969
— <i>Gosling v.</i>	vii.	406	— <i>Wharton v.</i>	vii.	474
— v. <i>In Error</i>	xii.	328	<i>Ward, Doe dem. Evers v.</i>	xviii.	197
<i>Vernon, Davies v.</i>	vi.	443	— <i>Hutton v.</i>	xv.	26
<i>Vertue, Clipsham v.</i>	v.	265	— <i>Keene v.</i>	xiii.	515
<i>Vickery, Regina v.</i>	xii.	478	— <i>Robinson v.</i>	viii.	920
<i>Victoria Park Company, Regina v.</i>	i.	288	<i>Warren, Mayor of Exeter v.</i>	v.	773
<i>Vigers v. Dean of St. Paul's</i>	xiv.	909	— <i>Nickalls v.</i>	vi.	615
<i>Vines, Williams v.</i>	vi.	355	<i>Warwick, Council of, Regina v.</i>	viii.	926
<i>Von Glehn, Elliot v.</i>	xiii.	632	<i>Warwickshire, Justices of, Regina v.</i>	vi.	750
W.					
<i>Waddington, Robinson v.</i>	xiii.	753	<i>Waterford, &c., Railway Company v. Logan</i>	xiv.	673
<i>Wade, Bainbridge v.</i>	xvi.	89	<i>Waters v. Earl of Thanet</i>	ii.	757
<i>Wadsworth v. The Queen of Spain</i>	xvii.	171	<i>Watford, Inhabitants of, Regina v.</i>	ix.	626
<i>Wainwright, Ashmole v.</i>	ii.	837	<i>Watkins v. Great Northern Railway Company</i>	xvi.	961
<i>Wakefield v. Brown</i>	ix.	209	<i>Watson v. Earl of Charle-</i>		
— v. <i>Newbon</i>	vi.	276	<i>mont</i>	xii.	856
— v. <i>North</i>	xiii.	536	— <i>Peyton v.</i>	iii.	658
<i>Wakeman v. Lindsey</i>	xiv.	625	<i>Watts, Webster v.</i>	xi.	311
<i>Walbottle, Inhabitants of, Regina v.</i>	ix.	248	— <i>Wright v.</i>	iii.	89
<i>Waldegrave, Earl, Regina v.</i>	ii.	341	<i>Waverton, Inhabitants of, Regina v.</i>	xvii.	562
<i>Walford, Barley v.</i>	ix.	197	<i>Wearing v. Smith</i>	ix.	1024
<i>Walker, Betts v.</i>	xiv.	363	<i>Weather, Neave v.</i>	iii.	984
— v. <i>Blackwall Railway Company</i>	v.	365	<i>Webb, Boyce v.</i>	xv.	84
— v. <i>British Guarantee Association</i>	xviii.	277	— <i>Levy v.</i>	ix.	427
— v. <i>Clements</i>	xv.	1046	— v. <i>Salmon</i>	xiii.	886
— v. <i>Doe dem. Evans v.</i>	xv.	28	<i>Waverton, Inhabitants of, Regina v.</i>	xiii.	894
			— v. —, <i>In Error</i>	xiii.	894
			— v. <i>Spicer</i>	xiii.	886
			— v. —, <i>In Error</i>	xiii.	894
			<i>Webber v. Richards</i>	i.	439
			<i>Webster, Boyle v.</i>	xvii.	950
			— v. <i>Kirk</i>	xvii.	944
			— v. <i>Watts</i>	xi.	311
			<i>Wedlake, Scott v., In Error</i>	vii.	766
			<i>Weedon Beck, Lords &c. of, Regina v.</i>	xiii.	808

GENERAL TABLE OF CASES

	Vol.	Page		Vol.	Page		
Weedon <i>v.</i> Woodbridge	xiii.	462	Whitaker, Harrold <i>v.</i>	xi.	147		
——— <i>v.</i> ———, In Error	xiii.	470	Whitaker <i>v.</i> Harrold, In Error	xi.	163		
Welchman <i>v.</i> Sturgis	xiii.	552	White <i>v.</i> Birmingham, Bristol and Thames Junction Railway Company	i.	282		
Wellesley, Lord, Hume <i>v.</i>	viii.	521	——— <i>v.</i> Hill	vi.	487		
Wellingborough, Inhabitants of, Ex parte	viii.	123	——— <i>v.</i> Humphrey	xi.	43		
Wellington, Inhabitants of, Regina <i>v.</i> note (a)	xi.	65	——— Reeves <i>v.</i>	xvii.	995		
Wentworth, Glave <i>v.</i> note (b)	vi.	173	——— Regina <i>v.</i>	iv.	101		
Westbrook, Regina <i>v.</i>	x.	178	Whitehead <i>v.</i> Harrison	vi.	423		
Westbury, Inhabitants of, Regina <i>v.</i>	v.	500	——— Hilton <i>v.</i>	xii.	734		
West, Carruthers <i>v.</i>	xi.	143	——— <i>v.</i> The Queen, In Error	vii.	582		
West Cornwall Railway Company <i>v.</i> Mowatt	xv.	521	Whiting, Livingstone <i>v.</i>	xv.	722		
Westhoughton, Inhabitants of, Regina <i>v.</i>	v.	300	Whitmarsh, Gillett <i>v.</i>	viii.	966		
West <i>v.</i> Jackson	xvi.	280	——— Regina <i>v.</i>	xiv.	803		
——— London Railway Company <i>v.</i> Bernard	iii.	873	——— <i>v.</i>	xv.	600		
——— Regina <i>v.</i>	i.	826	Whittaker, Gifford <i>v.</i>	vi.	249		
West Riding, Justices of, Regina <i>v.</i>	i.	{ 325	Whittem, Dalton <i>v.</i>	iii.	961		
Regina <i>v.</i> (Longwood <i>v.</i> Halifax)	i.	{ 624	Whittington <i>v.</i> Boxall	v.	139		
Regina <i>v.</i> (Drighlington <i>v.</i> Pudsey)	ii.	705	Whittles, Regina <i>v.</i>	xiii.	248		
Regina <i>v.</i> (Keighley <i>v.</i> Wilsden)	ii.	505	Whyte <i>v.</i> Rose, In Error	iii.	493		
Regina <i>v.</i> (Sheffield <i>v.</i> Crich)	ii.	331	Wickham <i>v.</i> Lee	xii.	521		
Regina <i>v.</i> (Re Vincent, a Lunatic)	v.	1	Widecombe on the Moor, Inhabitants of, Regina <i>v.</i>	ix.	894		
Weston, Doe dem. Priest <i>v.</i>	x.	763	Wigan, Inhabitants of, Regina <i>v.</i>	xiv.	287		
Wetherall, Bicknell <i>v.</i>	ii.	249	Wigg, Henniker <i>v.</i>	iv.	792		
Weymouth, Mayor &c. of, Regina <i>v.</i>	i.	914	Wiggins, Doe dem. Marlow <i>v.</i>	iv.	367		
Whalley <i>v.</i> Bramwell	xv.	775	Wigton, Overseers of, v.	xvi.	496		
——— Driscoll <i>v.</i>	xvii.	948	Snaith, Overseers of	vii.	317		
——— Rumbelow <i>v.</i>	xvi.	397	Wilcock, Regina <i>v.</i>	xvii.	261		
Wharton <i>v.</i> Mackenzie	v.	606	Wilde, Armistead <i>v.</i>	xii.	1		
——— <i>v.</i> Naylor	xii.	673	Wilkin, Hernod <i>v.</i>	xv.	Wilkinson <i>v.</i> Anglo-Californian Gold Mining Company	xviii.	728
——— <i>v.</i> Walton	vii.	474	——— Crafts <i>v.</i>	iv.	74		
Whatley, Gibbs <i>v.</i>	v.	396	——— <i>v.</i> Gaston	ix.	137		
Wheatley, Thompson <i>v.</i>	xvi.	189	——— <i>v.</i> Haygarth	xii.	837		
Wheeler <i>v.</i> Branscombe	v.	373	——— <i>v.</i> ——— In Error	xii.	851		
——— Bushel <i>v.</i> note xv.	xv.	442	——— <i>v.</i> Lloyd	vii.	27		
——— <i>v.</i> Montefiore	ii.	133	Willats, Regina <i>v.</i>	vii.	516		
Whipp, Regina <i>v.</i>	iv.	141	Willcox, Re	xiii.	666		
Whissendine, Inhabitants of, Regina <i>v.</i>	ii.	450	Willding <i>v.</i> Temperley	xi.	987		
			Williams Alexander <i>v.</i>	viii.	931		
			——— <i>v.</i> Chambers	x.	337		
			——— Davies <i>v.</i>	x.	725		
			——— <i>v.</i>	xvi.	546		
			Doe dem Lord Egremont <i>v.</i>	vii.	686		
			——— <i>v.</i> Downman, In Error	xi.	688		
			——— <i>v.</i> ———	vii.	103		
			——— <i>v.</i> The Queen, In Error	vii.	112		
				vii.	250		

REPORTED IN THE NEW SERIES.

[49]

	Vol.	Page		Vol.	Page
Williams, Harper <i>v.</i>	iv.	219	Winterstoke, Hundred of, Barwell <i>v.</i>	xiv.	704
——— In re	ix.	976	Witham, Inhabitants of, Regina <i>v.</i>	xii.	88
——— <i>v.</i> James	xv.	498	Witchford, Steward of Manor of, Regina <i>v.</i> note (b) i.	355	
——— <i>v.</i> Jones (11 A. & E. 643)	ii.	71	Witherby, Graham <i>v.</i>	vii.	491
——— <i>v.</i> Miles	ii.	276	Witherington, Kennet and Avon Canal Navigation Company <i>v.</i>	xviii.	531
——— <i>v.</i> Morgan	ix.	47	Wodehouse, Regina <i>v.</i>	xv.	1037
——— Mould <i>v.</i>	xv.	782	Wolseley <i>v.</i> Cox	ii.	321
——— Panton <i>v.</i> , In Error	v.	469	Wolton <i>v.</i> Gavin	xvi.	48
——— <i>v.</i> Stiven	ii.	169	Wolverhampton, Inhabitants of, Regina <i>v.</i>	xiv.	318
——— Timms <i>v.</i>	iii.	413	Woodbridge, Weedon <i>v.</i>	xiii.	462
——— Regina <i>v.</i>	vi.	273	——— <i>v.</i> , In Error	xiii.	470
——— <i>v.</i> Vines	xviii.	393	——— Union, Guardians of, Colneis Union, Guardians of	xiii.	269
Williamson <i>v.</i> Heath	vi.	355	Wood <i>v.</i> Connop	v.	292
——— <i>v.</i> Taylor	iv.	402	——— <i>v.</i> Dixie	vii.	893
Willim, Regina <i>v.</i>	v.	175	——— <i>v.</i> Green	vii.	178
Willington <i>v.</i> Browne	xvi.	1	——— <i>v.</i> Hewitt	viii.	913
Willmer, Regina <i>v.</i>	viii.	169	——— <i>v.</i> Lockwood	vi.	31
Willoughby <i>v.</i> Willoughby	xv.	50	——— <i>v.</i> Morewood note (a)	iii.	440
——— <i>v.</i>	iv.	687	——— <i>v.</i> Myton	x.	805
——— <i>v.</i>	vi.	722	——— <i>v.</i> Tassell	vi.	234
Wilson's, Carus, Case	vii.	923	——— <i>v.</i> Thompson <i>v.</i>	iv.	493
Wilson, Davison <i>v.</i>	xi.	890	——— <i>v.</i> Siunmons <i>v.</i>	v.	170
——— <i>v.</i> Eden	xiv.	256	——— <i>v.</i> Staunton <i>v.</i>	xvi.	638
——— <i>v.</i>	xviii.	474	——— <i>v.</i> Wood	iv.	397
——— Fuller <i>v.</i>	iii.	58	Woods and Forests, Commissioners of, Regina <i>v.</i>	xv.	761
——— <i>v.</i>	iii.	1009	Woods, McEwen <i>v.</i>	xi.	13
——— <i>v.</i> Holden	xiii.	815	Woodford, Bosanquet <i>v.</i>	v.	310
——— <i>v.</i> Nightingale	viii.	1034	Wooldale, Inhabitants of, Regina <i>v.</i>	vi.	549
——— <i>v.</i> Overseers of Liverpool	xvii.	303	Woolmer <i>v.</i> Toby	x.	691
——— , Regina <i>v.</i>	vi.	620	Worseye <i>v.</i> South Devon Railway Company	xvi.	539
——— Sir T. M., Regina <i>v.</i>	xviii.	348	Worth, Inhabitants of, Regina <i>v.</i>	iv.	132
——— <i>v.</i> Robinson	vii.	68	Worthenbury, Inhabitants of, Regina <i>v.</i>	vii.	555
——— <i>v.</i> Zulueta	xiv.	405	Worthington <i>v.</i> Grimsditch	vii.	479
Wilts, Justices of, Regina <i>v.</i>	xi.	758	Wray <i>v.</i> Chapman	xiv.	742
Wilton <i>v.</i> Dunn	xvii.	294	——— <i>v.</i> Toke	xii.	492
Winchester Corn Exchange, Proprietors of, <i>v.</i> Gillingham	iv.	475	Wrigley, Regina <i>v.</i> note (a)	ii.	732
Windham, Bessey <i>v.</i>	vi.	166	Wright, Birmingham, Mayor &c. <i>v.</i>	xvi.	623
Wing, Regina <i>v.</i>	xvii.	645	——— and Cromford Canal Company, In re	i.	98
Wingfield, Bales <i>v.</i> note (a)	iv.	580	——— <i>v.</i> Madocks	viii.	119
Winsford, Inhabitants of, Regina <i>v.</i>	xiii.	873	——— <i>v.</i> Martin <i>v.</i>	vi.	917
Windsor, New, Inhabitants of, Regina <i>v.</i>	vii.	908			
Winstor <i>v.</i> Dunford	xii.	603			
Winster, Inhabitants of, Regina <i>v.</i>	xiv.	344			
——— , Freeman (11 A. & E. 639)	xv.	50			
Winterbottom <i>v.</i> Ingham	vii.	611			
VOL. XVIII.—N. S.		f			

GENERAL TABLE OF CASES.

	Vol.	Page		Vol.	Page			
Wright, Polkinhorn <i>v.</i>	viii.	197	York, In re Dean of	ii.	1			
— <i>v.</i> The Queen, In Error, (Q. B. and Exch. Ch.)	xiv.	148	— Regina <i>v.</i>	ii	847			
— Rayner <i>v.</i>	iii.	922	— Newcastle and Berwick Railway Company, Railstone <i>v.</i>	xv.	404			
— <i>v.</i> Watts	iii.	89	— Regina <i>v.</i>	xvi.	886			
Wrightup <i>v.</i> Greenacre	x.	1	— Shaw <i>v.</i>	xiii.	347			
Wyatt, Hodgkinson <i>v.</i>	iv.	749	— and North Midland Railway Company, Fawcett <i>v.</i>	xvi.	610			
— Stulz <i>v.</i>	vi.	666	Young <i>v.</i> Clare Hall	xvii.	529			
Wylie <i>v.</i> Birch	iv.	566	— Doe dem. Hopley <i>v.</i>	viii.	63			
Wymondham, Inhabitants of, Regina <i>v.</i>	ii.	541	— Ex parte	xiii.	662			
Y.			— Hasleham <i>v.</i>	v.	833			
Yates <i>v.</i> Aston	iv.	182	— <i>v.</i> Hichens	vi.	606			
— <i>v.</i> Teale	vi.	282	Ystradgynlais Tithe Commutation, Re	viii.	32			
Yelvertoft, Inhabitants of, Regina <i>v.</i>	vi.	801	Z.					
York, Archbishop of, Doe dem. The Queen <i>v.</i>	xiv.	81	Zulueta, Wilson <i>v.</i>	x.	405			
— Mayor &c. of Regina <i>v.</i>	iii.	550						

CASES

Queen's Bench.
1852.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

HILARY VACATION,

XV. VICTORIA.

The Judges who usually sat in Banc during this Vacation
were :

Lord CAMPBELL C. J.	COLERIDGE J.
PATTERSON J.	WIGHTMAN J.

MEMORANDA.

In this Vacation,

Lord *Truro* resigned the office of Lord High Chancellor.

The Right Hon. Sir *Edward Burtenshaw Sugden* was appointed Lord High Chancellor, and was created a Peer by the title of Baron *St. Leonards of Slaugham* in the county of *Sussex*.

In the same Vacation,

Mr. Justice *Patteson* resigned the office of a Judge of the Court of Queen's Bench. He was shortly afterwards sworn in of Her Majesty's Privy Council.

Volume XVIII. Charles Crompton, of the Inner Temple, Esquire, was
 1852. appointed a Judge of the Court of Queen's Bench,
 being previously advanced to the degree of the Coif,
 when he gave rings with the motto *Quærere verum*.
 He afterwards received the honour of Knighthood.

Sir Alexander James Edmund Cockburn resigned the office of Attorney General, and was succeeded by Sir Frederick Thesiger. And Sir William Page Wood resigned the office of Solicitor General, and was succeeded by Sir Fitzroy Kelly.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

Tuesday,
February 3d. HALLETT, GOODEN, CLARK, ALLAN and HATFIELD
against DOWDALL.

Declaration
 against five
 defendants
 stated that de-
 fendants were

A SSUMPSIT. 1st count. For that, whereas defendants (plaintiffs in error) before and at the time of the proprietors and shareholders of, and partners in, a company called *The M. Assurance Company*: that plaintiff caused to be made a policy on ship &c. purporting that he made insurance at and from &c. against certain risks, which the said Company were contented to bear: and it was declared and agreed by and between the Company and the assured, That the capital stock and funds of the Company should alone be liable to answer and make good all demands under the policy, and that no proprietor of the Company should be in anywise liable to any demands, nor be in anywise charged, by reason of the said policy, beyond the amount of his share in the capital stock, it being one of the original and fundamental principles of the Company that the responsibility of the individual proprietors should in all cases and under all circumstances be limited to their respective shares in such capital stock: And the policy further stated that the Company were contented, and bound themselves, to the assured for the true performance of the premises: The count then alleged that, in consideration that plaintiff had paid the premium and promised defendants to perform all things in the policy contained to be performed on his part, defendants promised plaintiff that they would become and be insurers to plaintiff of 1100*l.* on the said ship during the time in the policy mentioned, and would perform all things therein contained on their part as such insurers of 1100*l.* to be performed; and defendants then became and were insurers to

making of the policy aftermentioned, and from thence continually until and at the time of the loss after mentioned, were proprietors and shareholders of and partners in a Company called *The General Maritime Assurance Company*; and thereupon the plaintiff (defendant in error) heretofore, viz. on 18th November, 1846, according to the

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

1100*l.* on the said ship. The count then averred total loss, and non-payment although the capital stock and funds of the Company had always been sufficient to pay plaintiff the 1100*l.*

One defendant demurred to the count, alleging uncertainty, and other grounds of special demurrer.

A second, *J. G.*, pleaded Non Assumpsit; and that the stock and funds had not been and were not sufficient.

A third pleaded that the policy was made after stat. 35 G. 3. c. 63., and that defendant's name was not expressed or specified on the policy; whereby the insurance became and was null: Special demurrer, alleging that the plea was an argumentative denial of defendant's subscription.

A fourth defendant pleaded that he was proprietor of fifty shares only, of 100*l.* each, and, before action brought, had paid claims and demands upon the Company in respect of insurances, to the amount of more than 5000*l.*, of his own moneys. Demurrer to the plea as being an argumentative denial of the sufficiency of the capital stock, and as amounting to a traverse of the promise, and as uncertain.

Held by the Court of Queen's Bench:

That the policy, as set out in the declaration, shewed a joint liability, capable of being enforced at law if the Company had sufficient capital stock and funds; which it appeared by the count they had: That an execution of the policy by the defendants sufficiently appeared: and that the count was good both on general and on special demurrer.

And that no material distinction arose in the case of the fourth defendant from his having paid on policies a sum equal to his subscription.

Also, as to the third defendant, that, the insurance being stated in the declaration to have been made by the Company, of which he was one, it was immaterial, since stat. 5 G. 4. c. 114., that individual subscribers were not named in the policy.

And, by *Erie* and *Wightman* Js., that his special plea was an argumentative Non Assumpsit.

On the trial of the cause, the second defendant, *J. G.* (no other appearing), tendered a bill of exceptions. The evidence and ruling which raised the exceptions were as follows.

The defendants were associated in a partnership for the purpose of effecting insurances; the capital to consist of 1,000,000*l.*, divided into 100*l.* shares. In fact, shares to the amount of 500,000*l.* only had been taken, upon which calls had been paid to the extent of 25*l.* per share, and a partial payment made on another call of 10*l.* The Company's deed of settlement provided that the affairs should be managed by a Board of directors, who should issue policies signed respectively by three directors (they being indemnified out of the funds), and should cause it to be stated in every policy that the subscribed capital of 1,000,000*l.*, and other the stocks, funds and property of the Company unapplied at the time of any claim or demand, should alone be liable to any claim under such policy; that the directors signing, or any of them, should not be responsible to the assured beyond the funds &c. in their hands or power at the time of recovery on the policy; and that no proprietor should in any event be liable beyond the amount unpaid on his share. The deed further provided that any proprietor sued in respect of any policy might give notice to the Board, and they might take the defence upon themselves, indemnifying such proprietor; and, if they should not do so, the proprietor should be compelled to pay the debt, and should not be reimbursed by the directors, provision was made for enabling him to recover the debt and costs against the proprietors individually.

The policy in question was in the form always adopted by the Company. It was headed " *M. Assurance Company.* Capital, one million;" and was executed by three directors, who

Volume XVIII. usage and custom of merchants, caused to be made a certain policy of insurance in writing purporting thereby

1852.

HALLETT
v.
DOWDALL.

were stated therein to sign in witness of the premises and that the Company were content with the assurance. Defendant

J. G. was a director, but did not sign. The policy was as set forth in the declaration, with clauses limiting responsibility to the capital and funds of

the Company, and exempting individual shareholders, except to the amount of their respective shares, but omitting the stipulation directed by the deed, that the directors signing should not be liable beyond the funds in their hands. Evidence was given for the defendant that the Company had not, when the cause of action accrued, or afterwards, "any moneys, property or available funds whatever in their hands" wherewith they could have satisfied plaintiff's claim.

The Judge ruled that the matters proved were evidence on which the jury would be justified in finding for the plaintiff on both issues: and that the Company had available capital stock and funds while a portion of the capital stock sufficient to pay the plaintiff remained uncalled for.

Held by the Court of Exchequer Chamber, affirming the judgment in Q. B.,

That the first count was good on general demurrer, inasmuch as it expressly stated a joint contract made by the defendants, which might be enforced at law. *Platt* B. dubitante.

That the count was also good on special demurrer, being sufficiently certain.

That the third defendant's plea, founded on stat. 35 G. 3. c. 63., was bad on general demurrer.

Judgment was also affirmed on the plea of the fourth defendant.

Held, further, in the Court of Exchequer Chamber, on the bill of exceptions :

By *Talfoord* J., and *Purke*, *Alderson*, *Platt* and *Martin* Bs.; That there was no evidence of a joint contract by the defendants.

By *Cresswell* and *Williams* Js.; That there was evidence of such joint contract, and of a sufficiency of capital stock and funds. And, by *Cresswell* J., that the clause in the deed of settlement, exempting every proprietor from liability beyond his own unpaid subscription, was either insensible, or void as being repugnant to the rest of the deed.

Sembles, by *Talfoord* J. and *Platt* B., and held by *Martin* B., that there was evidence of a several contract by each defendant with the assured to the amount unpaid on such defendant's shares.

Quare, per *Purke* and *Alderson* Bs., whether the policy, not being conformable to the power vested in the directors by the deed of settlement, was binding on the defendants.

A *venire de novo* was awarded.

according to the rate and quantity of the sum therein assured: And it was declared and agreed by and between the said Company and the assured that the capital stock and funds of the said Company should alone be liable to answer and make good all claims and demands whatsoever under or by virtue of the said policy; and that no proprietor of the said Company, his or her heirs, executors or administrators, should be in anywise subject or liable to any claims or demands, nor be in anywise charged, by reason of the said policy, beyond the amount of his or her share or shares in the capital stock of the said Company, it being one of the original and fundamental principles of the said Company that the responsibility of the individual proprietors should in all cases and under all circumstances be limited to their respective shares in the said capital stock: And further it was agreed by the said Company that that writing or policy of assurance should be of as much force and effect as the surest writing or policy of assurance heretofore made in *Lombard Street*" &c.: "And so the said Company were contented and did thereby promise and bind themselves to the assured, their executors, administrators and assigns, for the true performance of the premises, confessing themselves paid the consideration due to the said Company for the said assurance by the assured at and after the rate of" &c.: The count then stated a memorandum as to average &c., and proceeded: "Of all which premises the defendants afterwards, to wit on" &c., "had notice; and thereupon afterwards, to wit on the day and year aforesaid, in consideration that the plaintiff, at the request of the defendants, then paid to the defendants the sum of 92*l.* 8*s.* as a premium or reward for the insurance of 1100*l.* upon the said ship in the said policy of assurance mentioned

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Volume XVIII. during the time in the said policy mentioned, and then
1852. promised the defendants to perform and fulfil all things

HALLETT in the said policy of insurance contained on the part of
v.
DOWDALL. the insured to be performed and fulfilled, the defendants
then promised the plaintiff that they the defendants
would become and be insurers to the plaintiff of the
said sum of 1100*l.* upon the said ship in the said policy
of insurance mentioned during the said time in the
said policy mentioned, and would perform and fulfil all
things in the said policy of insurance contained on their
part as such insurers of the said sum of 1100*l.* to be
performed and fulfilled; and the defendants then became
and were insurers to the plaintiff, and then duly sub-
scribed the said policy of insurance as such insurers
of the said sum of 1100*l.* upon the said ship in the
said policy in that behalf mentioned.” The count
then averred interest of the plaintiff in the ship &c.;
authority of *Litt & Bushby* to insure for him, and that
their name &c. was inserted in the policy; and a total
loss by perils of the seas during the twelve months;
and it concluded: “And, although the capital stock and
funds of the said Company always from the time of the
making of the said policy hitherto have been and still are
sufficient to pay the plaintiff the said sum of 1100*l.* in
this declaration mentioned; of all which” &c. defendants,
to wit on &c., “had notice, and were then requested by
the plaintiff to pay him the said sum of 1100*l.* so by him
insured as aforesaid, and which said sum of 1100*l.* they
the defendants then ought to have paid according to the
form and effect of the said policy of insurance and their
said promise and undertaking so by them made as afore-
said, yet the defendants have not paid the said sum
of” &c., or any part &c.

2nd count, for money had and received by defendants

Volume XVIII. 2. To the 1st count, Denial of plaintiff's interest. 3. To
1852. the same, Denial of the loss. 4. To the same, That the

HALLETT
v.
DOWDALL.

capital stock and funds of the said Company have not been, nor are they, sufficient to pay plaintiff the said sum of 1100*l.* or any part thereof, in manner and form &c. Conclusions to the country. Issues thereon.

By *Clark.* 1. To 1st count, that the policy, and the promise of defendants, were made after the passing of stat. 35 G. 3. c. 63. (a), and after 5th July 1795; and that *Clark's* name was not expressed or specified on the said policy or on any other policy in respect of the contract for insurance in the 1st count mentioned; whereby the said insurance became and was null &c. Verification. 2. To 2d count, Non Assumpsit.

The plaintiff demurred to the 1st plea, on the ground that it was an argumentative denial of the allegation that *Clark* subscribed the policy, and that it ought to have concluded to the country. Joinder. Issue was joined on the 2d plea.

By *Allan.* 1. To both counts, Non Assumpsit. 2. To 1st count, that defendant was not a proprietor and shareholder &c., in manner and form &c. Conclusions to the country. 3. To 1st count. Plea founded on stat. 35 G. 3. c. 63., averring, as in *Clark's* first plea, that *Allan's* name was not specified in the policy; and that he did not subscribe the same in manner and form &c. Verification. 4. To 1st count, Denial of plaintiff's interest. 5. To the same, Denial of the loss. Conclusions to the country.

The plaintiff joined issue on pleas 1, 2, 4, 5, and demurred to plea 3 on the grounds that it ought to have

(a) "For granting to His Majesty certain stamp duties on sea insurances."

concluded to the country, that it amounted to Non Assumpsit, and that it was double. Joinder.

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

By *Hatfield*. To the 1st count, That, at the time of the making of the policy, and thence continually until the commencement of this suit, defendant was, and still is, the proprietor of 50 shares of 100*l.* each in the capital stock of the said Company, and no more: and that, after the making of the policy, and before the commencement of this suit, viz. on 1st *January* 1847 and on divers other days &c., divers claims and demands to a much larger amount than 5000*l.*, viz. to the amount of 11,370*l.*, were made upon the said Company and upon defendant as such proprietor of the said Company; which said claims and demands arose from and were occasioned by divers policies of insurance theretofore, and whilst defendant was such proprietor of the said shares as aforesaid, made by and on behalf of the said Company as insurers in the way of the trade and business of insurers, which during a long space of time, viz. for ten years, next before the commencement of this suit, the said Company carried on, and which said claims and demands were respectively made by divers persons to whom the said Company had by virtue of the said policies respectively become and been insurers upon divers ships and vessels, and which said persons respectively had sustained divers losses respectively which the said Company were at the time of the payments by defendant hereinafter mentioned liable to answer for and make good; to wit &c. (The plea then specified these claims.) And defendant saith that, the said claims and demands respectively being justly and truly due from the said Company as aforesaid, and being made by the said persons respectively before defendant

Volume XVIII. had any notice of the premises in the first count mentioned, defendant, so being such proprietor of the said shares in the said Company as aforesaid, did, long before the commencement of this suit, viz. on &c., pay to the said persons respectively so respectively making the said claims and demands as aforesaid, for and on account of their said respective claims and demands, divers large sums in the whole amounting to a much larger sum than 5000*l.*, viz. &c. (specifying the several payments). And defendant further saith that the said moneys so paid by him as aforesaid were his own proper moneys, and not the moneys of the said Company or of any other person whatever. And that he never hath at any time received from the said Company or from any person or persons whatever any moneys by way of contribution for or on account of the moneys so paid by him as aforesaid. Verification. 2. To the 2d count, Non assumpsit.

The plaintiff demurred to plea 1 as an argumentative denial of the allegation that the capital stock &c. were sufficient to pay plaintiff &c., and as not confessing that defendants were jointly liable on the policy, so that it amounted to a denial of the promise; also as not being sufficiently certain with respect to the claims &c., and as not concluding to the country. And he joined issue on plea 2. The defendant *Hatfield* joined in demurrer.

The demurrer in *Dowdall v. Hallett* was argued in the Court of Queen's Bench in *Michaelmas* term (*November 20th*) 1849.

Peacock, for the defendant, argued that the first count was bad on general as well as on special demurrer; and that defendant was not answerable at law as on a joint

Volume XVIII. Company should alone be liable to answer" all claims
1852.

HALLETT
v.
DOWDALL.

Company should alone be liable to answer" all claims and demands under the policy, and that no proprietor should be liable, by reason of the policy, beyond the amount of his own share? The expression, that the capital stock and funds shall be liable, must be understood with reference to the subject matter. We must notice that the Company are a body from time to time insuring and meeting losses, and that they look, not merely to the nominal capital, but to that which may be their fund from time to time, varying in amount, and being, in effect, whatever may be their joint stock and capital not expended for other purposes. Then, the meaning of the policy is, not that, in the event of the nominal fund failing, no one shall be further liable, but that no one shall be answerable beyond the amount of his shares, it being a fundamental rule of the Company "that the responsibility of the individual proprietors" be in all cases "limited to their respective shares in the said capital stock:" and so it is, if the capital stock alone be liable, for then no one proprietor will be liable beyond what he has or ought to have paid up. So far, then, the engagement is a joint one and nothing else: we undertake, but only to the extent of the capital fund. That made it material to aver in the declaration that there were a capital stock and funds available: and the declaration does so allege, which prevents the qualification relied upon from having any effect as an answer to the action. The defendants have agreed that the fund shall be liable; there is a fund, to which that liability attaches; and they have not paid. Throughout, a joint liability appears; and the declaration is good.

WIGHTMAN J. The declaration shews *primâ facie* a

joint contract: but a stipulation is recited, that the capital stock and funds alone shall be liable. If the case rested there, it being averred that the capital stock is sufficient for the present demand, there appears no legal objection to the liability. The question is, as to the stock and funds, that is, funds arising from the joint trade, available in case of loss. The proviso might afford a defence if the capital stock and funds were not sufficient; but it is averred that they are. The latter provision "that the responsibility of the individual proprietors should" "be limited to their respective shares," is hardly material to the present case, because the endeavour here is to affect, not the defendant individually, but the funds which are in the disposition of the joint body, and are alleged to be sufficient.

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

ERLE J. The cases cited for the plaintiff are an authority upon this, and shew that there is a valid cause of action. And on principle it is clear that the judgment ought to be for the plaintiff. The duty of the Court is to give effect to the whole instrument if possible; to those clauses which are in favour of the assured as well as those which operate for the insurers. The Company receive a premium, and agree that the contract shall be "of as much force and effect as the surest writing or policy of assurance" &c., a clause to be attended to in the construction of the instrument, and which means that the Company will stand in the situation of insurers, and indemnify accordingly: but this they would not do if it could be alleged (as the defendant has done) that no action at law lay against them, and that the assured must apply to a Court of equity. The qualification, that the capital

Volume XVIII. stock and funds alone shall be liable, must be construed with the rest of the contract; and the meaning is, that the Company undertake to indemnify so long as there are capital stock or funds which they can command for the benefit of the assured. Looking to the record, we must assume that the whole Company are the defendants, for that, if they had not been so, they might have taken advantage of the omission; and we must take it also that they have funds out of which the assured might be indemnified, but that they do not choose so to employ them; for the declaration alleges that there are sufficient funds, and this defendant has not denied it. The proviso that no individual shareholder shall be liable beyond the amount of his own share merely follows up the clause limiting the general liability. If they have capital stock and choose to retain it instead of paying indemnities, it is not true that, on their being sued, individuals must be liable beyond the amount of their shares because execution may be enforced against one shareholder for more than his: for, on the assumption that there is a joint fund applicable, the individuals sustain a loss only because the Company have money in their hands which they do not choose to apply.

Judgment for plaintiff.

The demurrer in
Dowdall v. Clark was argued in the Court of Queen's Bench on the same day.

Butt, for the plaintiff, relied upon *Reid v. Allan* (a),

where the Court of Exchequer held that stat. 35 G. 3. Queen's Bench.
c. 63. s. 11. is sufficiently complied with, since stat. 1852.
5 G. 4. c. 114., if the name of the assuring firm be
expressed on the policy, though the names of the
individual insurers do not appear. HALLETT
v.
DOWDALL.

Bovill, contrà. That case differs from the present, because it was stated there that persons (named) "duly subscribed" the policy "for and on behalf of the defendant." Here no such averment of execution is made, nor are there any words amounting to an express statement that the Company contracted: and in the allegation of mutual promises it is said that "the defendants" promised. It may be sufficient, according to the case cited, that the general name of a Company should be stated, and not the names of its members; but at least the signature of a contract by the Company, or by their agents, should be formally averred. The plea, therefore, is good on general demurrer: and the objection taken by special demurrrer is groundless, because the plea does not simply deny an averment in the declaration, but raises a defence of illegality. The general statement in the count does not necessarily mean that the defendant's name was subscribed to the policy: and it lay upon the defendant to shew that the policy was not executed according to law for want of proper subscription.

Butt, contrà. The illegality is not shewn. It is consistent with the plea that the policy may have been subscribed by the Company. [Wightman J. The plea is in effect that there was no contract. Erle J. That is the effect of the averments.]

Volume XVIII. 1852. **COLERIDGE** J. This case is not distinguishable from *Reid v. Allan* (a). The contract of insurance appears to be made by *The Maritime Assurance Company*; and then, under the statutes which have been cited, individual names are not necessary.

WIGHTMAN J. I am of the same opinion. The plea is bad also on special demurrer, because it is an argumentative traverse, and amounts to *Non assumpsit*.

ERLE J. concurred.

Judgment for plaintiff.

No counsel appeared for the defendant in *Dowdall v. Allan*. Judgment for plaintiff. In

Dowdall v. Hatfield, Montague Smith was to have argued for the defendant, but admitted that, if the fact of the defendant having paid to the amount of his shares did not constitute a defence (which appeared to be the result of the decision pronounced this day in *Dowdall v. Hallett*), he could not resist the demurrer.

Per Curiam,

Judgment for plaintiff.

A jury was summoned to try the issue of fact, and to assess damages on the issues upon which judgment had been given: and the cause was tried before Lord *Campbell* C. J. at the *London* sittings after *Michaelmas* term, 1850, when *Gooden* appeared, but the other defendants made default; and the verdict on the issues of fact was: As to *Hallett*, for defendant. As to *Gooden*, for the plaintiff on the issue upon *Non Assumpsit* to the 1st count; for defendant on the issue

upon Non Assumpsit to the 2d count; and for the plaintiff on the other three issues. As to *Clark*, for the defendant. As to *Allan*, for the plaintiff on the issue upon Non Assumpsit to the 1st count, for defendant on the Non Assumpsit to the 2d count, and for the plaintiff on the remaining issues. As to *Hatfield*, for the defendant. Damages 1265*l.* *Gooden* tendered a bill of exceptions, the material statements in which were as follows.

That, on behalf of the plaintiff, evidence was given on the first and last issues between him and *Gooden*, that, before and at the time of the making of the policy, the defendants and divers other persons were associated together for the purpose of carrying on, and did carry on, the business of insurers of ships against perils of the seas, under the name, style and title of *The General Maritime Assurance Company*, and by, under and according to the terms of a certain indenture or deed of settlement bearing date 23d April 1840, Whereby,

After reciting that the several persons parties thereto, or those under whom they claimed, had associated themselves together into a company or partnership under the style or firm of *The General Maritime Assurance Company* for the purpose of effecting insurances on ships and vessels and on freight and goods, and agreed to raise for such purposes a capital of one million pounds divided into shares of 100*l.* each, and that the number of shares taken by each of the parties thereto was written opposite to his or her name and seal subscribed and affixed by him or her respectively thereto: It was witnessed and declared that the several persons parties thereto, all of whom were thereafter distinguished by the title of

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Volume XVIII. proprietors, and the several other persons who should
1852. become proprietors as thereafter was mentioned, should,

HALLETT
v.
DOWDALL. whilst holding shares in the capital of the Company, be,
and continue until dissolved under the provisions there-
inafter in that behalf contained, a Company or partner-
ship by and under the name of *The General Maritime
Assurance Company*. That the capital of the Company
should consist of 1,000,000*l.*, divided into 10,000 shares
of 100*l.* each. That the business of the Company,
which commenced on 20th *May* 1839, might continue
to be carried on although the whole of the capital might
not be subscribed for and all the shares taken up; that,
the sum of 5*l.* per share having been paid up, the re-
maining 95*l.* per share should constitute a guarantee for
the obligations of the Company, and should not be called
for (unless for the purpose of meeting any extraordinary
demand upon the Company) without the concurrence of
the proprietors. That the direction and management
of the affairs and concerns of the Company should be
confided to a Board of Directors consisting of not more
than twenty nor less than twelve members (a).

That, when and so often as the Board of Directors,
or a daily committee, which they were enabled to
appoint, should accept a proposal for an assurance to
be effected with the Company, the Board should
forthwith issue a policy of assurance to the person or
persons making such proposal, and such assurance should
be at such premiums, for such time, for such voyage, and
against such risks, &c., for and against which the Board
or committee should have agreed that such assurance
should be effected. That the Board should be at liberty

(a) Some subsequent provisions of the deed, not material to this report,
are omitted.

to adopt such forms of policies, deeds and other documents for the use of the Company, and to vary them from time to time, as they might think proper. That the Board should cause every policy by which an insurance should be effected with the Company to be signed and duly executed by three of the directors, and the directors signing the policies should be indemnified out of the funds or property of the Company for all liabilities in consequence thereof. That the Board should cause it to be stated in every policy by which an assurance should be effected with the Company that the subscribed capital of 1,000,000*L*, and other the stocks, funds and securities and property of the Company which, at the time of any claim or demand being made in respect of such policy, should remain unapplied and undisposed of in pursuance of the trusts, powers and authorities mentioned in the deed of settlement, should alone be liable to make good all claims and demands upon the Company in respect of such policy, and that the directors signing such policy, or any of them, should not be responsible to the person to whom such policy might be issued to any greater extent than the funds or property in their hands or power at the time of recovering upon such policy should be competent to discharge, and that no proprietor should in any event whatever be liable beyond the amount of the unpaid part of his share or shares in the said subscribed capital stock of one million.

That it should be lawful for the Board of Directors to settle all losses and averages upon assurances as soon as the adjustment thereof should have taken place, or according to any rule or regulation they might think fit to establish for that purpose. That the premiums re-

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Volume XVIII. ceived in respect of insurances granted by the Company,
1852.

HALLETT
v.
DOWDALL. and the profits arising from moneys advanced upon bot-
tomry, mortgage, respondentia or otherwise, and the
accumulations thereof respectively, and all other profit
received by or accruing to the Company, should in the
first instance be the fund for answering all claims and
demands upon the Company in respect of its assurances
or otherwise, and the capital of the Company should not
be resorted to for any such purpose until such fund
should have been wholly exhausted. That, in case any
extraordinary demand should at any time or times be
made upon the Company, it should be lawful for the
Board of Directors, for the purpose of meeting the same,
from time to time to come to a resolution that all the
proprietors or other holders for the time being of shares
in the capital of the Company should be called upon to
pay, after the expiration of three calendar months from
the time of such resolution, a further instalment on each
of such shares in addition to the sum or sums which
might for the time being have been previously paid in
respect thereof, until 100*l.* per share, exclusive of any
sum which might have been returned to the proprietors,
should have been paid on each of such shares.

That, whenever any such notice as thereafter men-
tioned should have been given to the Board of Directors
or to some one or more of them, or to the secretary, &c.,
by any proprietor, or the husband of any female pro-
prietor, or the executors or administrators of any de-
ceased proprietor, or the assignees of any bankrupt or
insolvent proprietor, of any claim or demand having
been made, or of any action, suit or other proceeding
having been brought, &c., against him, her or them
by any creditor or other person having or supposing

himself to have any claim or demand upon the Company, the Board of Directors should proceed without delay to take such notice into consideration, and should signify in writing to the proprietor or other person giving the notice their intention to take the said debt, claim or demand upon themselves, and either to pay the same or defend such action, suit or proceeding at the expence of the Company; and the proprietors or other person or persons upon or against whom any such claim or demand might be made, or such action, suit &c. might be instituted, should be indemnified out of the funds or property of the Company from all liability in consequence thereof.

*Queen's Bench.
1852.*

HALLETT
v.
DOWDALL.

That, if any action or suit at law or in equity should be brought by any creditor or other person having or supposing himself to have any claim or demand upon the Company or upon the proprietors thereof for or in respect of any policy issued by the said Company, or of any judgment or debt due or owing by them, &c., or for any other cause, matter or thing whatsoever relating thereto, against any proprietor, or the husband &c., or the executors &c., or the assignee &c., and the proprietor &c., against whom such action &c. should be brought should be compelled, adjudged or decreed to pay the debt &c. so claimed or demanded &c., or should sustain any loss, costs, charges, damages and expenses in defending or resisting any such debt, claim &c., then and in every such case the debt, claim or demand, or the sum decreed or adjudged to be paid, and the loss, costs, &c., should be considered as a debt due and owing by the Company to the proprietor or proprietors or the person or persons by whom the same should be decreed or adjudged to be paid, or who should so pay, incur or

Volume XVIII. sustain the same, and should be borne and paid by the
1852. several proprietors for the time being of the capital

HALLETT
v.
DOWDALL. of the said Company in proportion to their respective shares or interest therein. And that, when and so soon as the costs to which any proprietor &c. should be subject in consequence of such claim, action, &c. should have been ascertained, then and immediately thereupon, the debt &c. or the sum decreed &c. to be paid, and the amount of such costs, should be paid on demand by the directors or trustees for the time being of the Company, or any of them, out of the funds or property of the Company in their hands to the proprietor &c. so decreed or adjudged to pay, &c., and should be allowed to the said directors and trustees as a payment made on account of the Company, and as if such payment had been ordered by resolution of the Board of Directors. And that, if the directors or trustees for the time being of the Company should neglect or refuse, or should not have in their hands sufficient funds belonging to the Company to enable them, to pay within the space of fourteen days next after such demand as aforesaid should have been made upon them, the whole or any part of such debt and costs, or so much thereof as should not have been paid by the directors or trustees, should be divided by the proprietor or proprietors, or other person or persons by whom the same should have been decreed or adjudged to be paid and who should be subject or liable to pay the same, into 10,000 equal parts or shares or into as many equal parts or shares as the capital of the said Company should at that time be considered as divided into, and each and every proprietor for the time being of the said Company should, in proportion to the extent of his or her share or interest

therein, pay one or more of such parts or shares upon demand to the proprietor or proprietors or other person or persons who should have paid or who should be liable to pay such debt and costs. And that, on neglect or refusal to pay such proportion, the proprietor entitled to payment should have a right of action against those in default; but not unless he should have given notice under his hand to the Board of Directors (as prescribed by the deed) of the claim or demand made upon him, and have required them to pay the same or to take such claim or demand upon themselves, and defend at the Company's expense. And, to facilitate the remedy in such cases, each and every party to the deed, severally and individually, and in proportion to his interest in the capital, but not further, did covenant with the other parties thereto, and with any two, three or more of them jointly, and with each of them severally, to pay any party sued &c. and adjudged &c. to pay, or sustaining loss &c. (after taxation and apportionment of the debt and costs as above stated), such part of the debt and costs as should be due from the covenanting party, according to his interest.

The bill of exceptions then stated that the plaintiff's counsel gave in evidence that the defendants, before the making of the policy, severally executed the said deed. That at the time of making such policy they severally held shares in the capital stock of the Company, and that *Gooden* was at that time a director, and a holder of 250 shares of 100*l.* each. That, at the last mentioned time, *John Brightman*, *John Fulford Owen* and *Francis Chambers* were also directors. That plaintiff, on 18th November, 1846, by certain persons then trading under the name, style and firm *W. P. Litt and Bushby*, his

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Volume XVIII. agents duly authorized in that behalf, caused to be
1852. made a certain policy of assurance, which said policy
HALLATT was signed by the said *J. Brightman*, the said *J. F.*
v. **DOWDALL.** *Owen* and the said *F. Chambers*, as three of the directors
of the said Company, on behalf of the said Company,
and was in the words, letters and figures following:—

No. 66,261.

A

11004

The General Maritime Assurance Company,

London.

Capital one million.

Directors,

John Brightman Esquire, Chairman.

(The other directors, among whom were *Francis Chambers* and *J. F. Owen*, were then named: also the trustees, secretary, &c.)

rate and quantity of the sum herein assured. And it is declared and agreed by and between the said Company and the assured that the capital stock and funds of the said Company shall alone be liable to answer and make good all claims and demands whatsoever under or by virtue of this policy, and that no proprietor of the said Company, his or her heirs, executors or administrators, shall be in anywise subject or liable to any claims or demands, nor be in anywise charged by reason of this policy, beyond the amount of his or her share or shares in the capital stock of the said Company, it being one of the original and fundamental principles of the said Company that the responsibility of the individual proprietors shall in all cases and under all circumstances be limited to their respective shares in the said capital stock. And further it is agreed by the said Company that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in *Lombard Street* or in the *Royal Exchange* or elsewhere in *London*. And so the said Company are contented and do hereby promise and bind themselves and their successors to the assured, their executors, administrators and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto the said Company for this assurance by the assured at and after the rate of eight guineas per cent., to return 10s. per cent. for each uncommenced month if the policy be cancelled" &c. "Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general or the ship be stranded." (Other stipulations followed as to average.) "In witness whereof, and that the said Company are content with this assurance for the sum of 1100*l.*, three of the directors of the said Company have hereunto set their hands this 18th day of *November* in the year 1846."

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

(Signed) "John Brightman. J. F. Owen. Francis Chambers."

It was further stated that the policy was in the form always used by *The General Maritime Assurance Company*. That, on 16th *July*, 1847, plaintiff, by his agents, gave the directors notice of abandonment of his interest in the ship, she not having been heard of since *March* 26th, when she sailed from *Liverpool*. That the Secretary to the Company replied, stating that the directors did not consider the abandonment justified: but that, on a subsequent demand, the secretary wrote and signed on the policy an adjustment as for a total loss; the amount being 1100*l.* The plaintiff's counsel further gave in evidence that 7500

Volume XVIII. shares in the said capital stock of the said Company had at one time after the making of the said deed of settlement been subscribed for and held by the defendants and divers other persons respectively. That, at the time of the accruing of the cause of action in the first count mentioned, about 5000 of the said shares were held by the defendants and divers other persons respectively, the remainder of the said 7500 shares having been forfeited by death, bankruptcy and otherwise.

**HALLITT
v.
DOWDALL.**

That calls upon the defendants and the other proprietors of shares in the said capital stock had been made, to the extent of 25*l*. per share and no more. That the last of such calls on the said proprietors was made on 29th *September* 1847, and was a call of 10*l*. for each share, and was due on the 30th *December* 1847. That nothing was in fact paid by the said proprietors of shares towards the funds of the Company in respect of the last mentioned call, but that certain of the directors and proprietors of shares in the said capital stock, previously to the making of the said last call, severally advanced divers sums, in the whole amounting to 10,500*l.*, towards the funds of the Company in anticipation of the said call. That the Company ceased to underwrite policies in *October* 1847; but that the directors continued to attend at the office of the Company, and to transact business there, for between three and four months longer; at the expiration of which time the office was given up. And thereupon plaintiff's counsel closed his case.

The bill of exceptions went on to state that the counsel for *Gooden* thereupon gave in evidence and proved that the Company "had not, at the time of the accruing of the cause of action in the 1st count

mentioned, nor at any time afterwards before the commencement of the suit, any moneys, property or available funds whatever in their hands wherewith they could have paid or satisfied the plaintiff's claim upon the said policy, or any part thereof;" and counsel submitted to the Lord Chief Justice that, upon the several matters in evidence, he ought to direct a verdict for *Gooden* on the first issue; for that: 1. "No action at law would lie upon the said policy." 2. "The defendants were not jointly liable upon the said policy, but, if liable at all at law, were only liable severally to the extent of the shares held by them individually." 3. "No action would lie upon the policy against *Gooden*, inasmuch as he had not signed the said policy." 4. "The promise alleged in the 1st count of the declaration had not been proved, inasmuch as the promise therein alleged was a general promise by the defendants to become and be insurers to the plaintiff, whereas the only promise to be collected from the terms of the said policy (if any promise at all was to be collected therefrom) was a promise to pay out of the capital stock and funds of the Company if they were sufficient; and that, except the said policy, no evidence of any promise had been given." 5. "The said policy was illegal and void by reason of" stat. 35 G. S. c. 63., "inasmuch as the names of the several defendants were not expressed or specified on the said policy; and that, as the plaintiff had falsely stated in the 1st count that the defendants subscribed the said policy, the defendant *J. Gooden* had been unable to plead the said illegality specially, and was therefore entitled to insist upon such illegality under his first plea" (*Non Assumpsit*). And counsel further sub-

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Volume XVIII. mitted that, upon the matters in evidence, the Lord
1852. Chief Justice ought also to direct a verdict for the defendant *Gooden* upon the last issue between him and the plaintiff.

HALLETT
v.
DOWDALL.

That the Lord Chief Justice delivered his opinion to the jury, that the several matters so given in evidence were evidence upon which they would be justified in finding a verdict for the plaintiff on the first issue: and he further delivered his opinion that, although the Company had no money in hand, yet in point of law they had available capital stock and funds while a portion of the capital stock sufficient to pay the plaintiff remained uncalled for. And that the matters given in evidence were evidence on which the jury would be justified in finding a verdict for the plaintiff on the last issue: and with these directions he left the first and last issues to the jury. Whereupon counsel for the defendant *Gooden* excepted &c.

Judgment being entered up for the plaintiff, a writ of error was brought in the Exchequer Chamber by all the defendants, the bill of exceptions being annexed to the record. The grounds of error specially assigned were: That the 1st count was not sufficient in law: That *Clark's* first plea and *Hatfield's* first plea were sufficient in law: And that the rulings of the Lord Chief Justice stated in the bill of exceptions were erroneous. The plaintiff joined in error.

The writ of error was argued in last *Michaelmas* vacation, November 26th and December 3d.

Peacock, for the plaintiffs in error, defendants below, admitted that, after the case of *Reid v. Allan* (a), fol-

lowed up by the decision in the Queen's Bench, the *Queen's Bench.*
plea on stat. 35 G. 3. c. 63. s. 11. could not be supported. 1852.

The declaration is bad, both on general and on special demurrer. This is not a registered Company under stat. 7 & 8 Vict. c. 110.; but *Halket v. Merchant Traders' Insurance Company* (*a*) (which was a case under that statute) applies. There the action was against a registered Company, upon a marine policy exempting individual proprietors from liability beyond the amount of their respective shares, and making the capital funds alone liable to all charges: execution was moved for, under the statute (sect. 68), against an individual shareholder, Lord *Talbot*: and Lord *Denman* C. J. said "It is plain that no action would have lain against Lord *Talbot* on this policy, to which he is not individually a party:" and he added, referring to the words of the special clause: "In truth they have no sensible meaning at all, unless it be this, that the assured shall look to the funds of the Company alone, so far as any remedy at law extends, and that the individual subscribers shall be liable only to contribute to the funds of the Company to the amount of their respective shares, which liability must be enforced by the Company against the subscribers, either at law or in equity, as the case may be, and the enforcement of which liability may possibly be compelled by the assured by some proceeding against the Company." That decision was cited, and acted upon, in *Hassell v. Merchant Traders' Ship Loan & Insurance Association* (*b*), where the proceeding (also under sect. 68 of stat. 7 & 8 Vict. c. 110.) was against the same member of the same Company. If a party may limit his responsibility in a

HALLETT
v.
DOWDALL.

Volume XVIII. case under the statute, he may do so, by express stipulation, where the Company is not registered under the statute.

1852.
HALLETT
v.
DOWDALL.

The consequence may be that the assured may have to file a bill against the directors to compel the making of calls, and that will be the fund which he must look to: it cannot be assumed, on a policy and deed of settlement like those in the present case, that each subscriber gives a guarantee for the making of necessary calls, and for their being paid up. In *Alchorne v. Saville* (*a*), a case of fire insurance, the policy was executed by three trustees and directors, who thereby ordered, directed and appointed the directors for the time being to raise and pay out of the moneys of the society, pursuant to certain deeds and settlements, the amount of total or partial loss &c.; and the question was whether an action at law for the amount of a loss could be maintained against directors for the time being. The Court of Queen's Bench held that there was no agreement under which either the directors for the time being, or the parties who actually executed the policy, could be liable: and *Abbott C. J.* said: "It" "seems to me, that the only remedy the plaintiffs have is in equity, and they cannot turn round and treat this as a covenant at law." In *Andrews v. Ellison* (*b*), which may be cited on the other side, there was a declaration by the defendants, who, as directors of an insurance company, had executed a policy under seal, that the Company should make good losses, according to their deed of settlement; and this was held to be a covenant by the defendants to pay out of the Company's funds if they should be adequate, which it was alleged they were. There was no appor-

(*a*) 6 *B. Moore*, 202, note (*a*) to *Andrews v. Ellison*.

(*b*) 6 *B. Moore*, 199.

tionment of individual liability there, as in the present case. [Alderson B. What do you say the contract is in this case?] Either an equitable charge merely, upon the funds of the Company; or an equitable charge on those funds with a separate agreement by each individual to pay to the extent of his capital not already paid up: but no joint liability is created. [Platt B. Do you allow that there is any contract at law?] There is none. Parties may deal so. It was competent to the insurers to say in terms, "You shall have a charge upon the funds, enforceable in equity." [Alderson B. It is strange to insure a ship without any contract in law.] If there is any, it is by each shareholder separately to make good the loss to the extent of his unpaid capital. But this construction leads to much difficulty. For then, if a shareholder to the amount of 1000*l.* had paid up 500*l.*, he might be liable to the claims of fifty holders of policies, each to the amount of 500*l.*; and it would be no answer to one, that he had paid another. The better construction is, that the only persons liable are the directors, and they out of the Company's funds; the shareholders being bound among themselves to make up these funds if required, according to their respective liabilities and the sums they have already paid. A precedent for a case of this kind is found in *Dr. Salmon v. The Hamburg Company* (a), where, on bill filed by a creditor against a mercantile company having power to levy taxes upon its members, it was ordered by the House of Lords, on appeal, that process should issue out of Chancery against the Company, to compel an answer; that the Court of Chancery

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Volume XVIII. should examine what the just debt was, and decree
1852. payment; and, on default, should make a decree requiring

HALLETT

v.

DOWDALL.

the Company to levy the amount upon every member contributory to the public charge, and pay the same over; and, if, by a time to be limited by the Court of Chancery, the money assessed should not be paid, "then and from thenceforth every person of the said Company, upon such a levitation, shall be made to be liable in his capacity to pay his quota or proportion assessed;" process to issue against any person refusing or delaying to pay his quota, "as is usual against persons charged by decree of the said Court, for any duty in their several capacities." [Platt B. It would be very inconvenient that every shareholder should be made defendant in a suit in equity.] The consequence which has been pointed out if every shareholder were individually liable, at law, to the amount of his unpaid quota upon each policy, is still more inconvenient. And the hardship would be even greater if they were jointly liable; for then each shareholder would be responsible at once to the whole extent of the unpaid capital, notwithstanding the exemption in the deed. One defendant, in this case, Hatfield, has already paid more than the total amount of his shares. [Parke B. The point for you to argue seems to be that, under the deed of settlement, the directors had no power to make a policy which should bind any but themselves, or perhaps the Board which gave them orders; not to bind individual shareholders. The form of the policy looks as if the assured must have had notice that that was so. You may contend that the defendants have not subscribed the policy by their agents unless the agents had power to bind them personally. Alderson B. The shareholder being merely

guarantee to the directors, to the extent of his unpaid share. *Parke* B. But the point, that you did not subscribe by your agents, is not open to you on demurrer. *Alderson* B. We cannot tell, on this demurrer, that you did not expressly order the directors to subscribe the policy.] The defendants may insist upon their own construction on Non Assumpsit. It is true that only one defendant, *Gooden*, has filed a bill of exceptions: but, if he was not a joint contractor, the objection, that one defendant too many is sued, will be available to all.

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Mellish, contra. First, as to the demurrs. The insurance declared upon is either a contract by all the defendants jointly, or no legal contract at all, or a contract by each shareholder individually. Looking to the policy as set out in the declaration, it is clear that the contract was by all the defendants jointly. The policy states an agreement between the assured and the "Company;" and the insurers appear under that name in several parts of the instrument. The only clause inconsistent with a contract in that character is the stipulation that the funds alone, and not any individual (beyond the amount of his own share), shall be liable. Even here, the agreement is on the part of the "Company;" and the construction which makes the clause consistent with the rest of the policy is, that the Company are to be liable out of the capital stock and funds, if there are funds, but that, if there are not, no individual shall be answerable beyond the amount of his share. Now it is admitted that there are funds: therefore the condition under which the Company are to be liable is fulfilled, and their engagement becomes

Volume XVIII. absolute. If any proprietor is damaged, there is a stock from which he can reimburse himself. The supposition that a mere equitable charge was created is groundless. The parties have used no words creating such a charge. Nor could it have been intended to make the directors mortgagors, and so incapable of dealing with the fund. If the liability under this policy creates an equitable charge, every policy executed by the Company creates one; and then, whenever a question of average or total loss, or any other dispute upon a policy, arises, every shareholder and creditor must be made a party. No such usage has ever been set up, in the many actions which have been brought against Companies since stat. 5 G. 4. c. 114. As to the cases: *Halket v. Merchant Traders' Insurance Company* (*a*) is an authority for rather than against the plaintiffs. The defendants were a registered Company, against whom, undoubtedly, the action lay: the motion was for execution against an individual subscriber; and the Court held that, under a clause in the policy charging all claims and demands upon the capital stock and funds, and exempting individual proprietors, execution against an individual could not be granted. Here the defendants are not a registered Company; but they have entered into a contract of insurance by their joint name, and must be jointly liable. They have, indeed, limited the responsibility of individuals so far as the law would allow: but that attempted restriction cannot alter the nature of a contract which is essentially joint. *Hassell v. Merchant Traders' Ship Loan & Insurance Association* (*b*) merely follows up the last cited decision. *Alchorne v. Saville* (*c*) turned upon

(*a*) 13 Q. B. 960.

(*b*) 4 Exch. 525.

(*c*) 6 B. Moore, 202, note (*a*).

HALLETT
v.
DOWDALL.

peculiar words, which imported an order and not a promise, and upon the want of execution ; on which grounds the case, when cited in *Andrews v. Ellison* (*a*), was held distinguishable ; and the Court of Common Pleas there affirmed the liability of parties executing a policy, to the extent of the Insurance Company's funds, notwithstanding a provision limiting individual liability. In *Gurney v. Rawlins* (*b*), directors of an Insurance Company executed a policy, ordering and appointing that, in a certain event, "the capital stock and funds of the said Company should stand charged and be liable to pay to the executors" &c. of £. 500^l.; and it was argued that this was not a contract, but a mere charge upon the fund. But Lord *Abinger* said : "No; they personally undertake to pay the money." "The defendants are liable in their own persons. The policy does not give any right against the fund itself, though, if the fund should turn out to be inadequate, they might not be liable." And *Parke* B. added : "The defendants undertake by an instrument under seal that this sum of money shall be paid, if the funds prove adequate; therefore it is equivalent to a covenant to pay if *J. S.* go to *Rome*." The two last mentioned cases were acted upon in *Dawson v. Wrench* (*c*). There are instances in which an obligation has been imposed by statute to pay moneys to individuals out of corporation funds, and it has been held that those parties might maintain actions of contract against the corporations, having funds applicable; *Tilson v. The Warwick Gas Light Company* (*d*), *Carden v. General Cemetery Company* (*e*). The case of *Dr. Salmon v. The*

Queen's Bench.
1852.

*Hallett
v.
Dowdall.*

- (*a*) 6 *B. Moore*, 199.
(*c*) 3 *Exch.* 359.
(*e*) 5 *New Ca.* 253.

- (*b*) 2 *M. & W.* 87.
(*d*) 4 *B. & C.* 962.

Volume XVIII. *Hamburg Company* (a) cannot be taken as a guide.
1852.

*HALLETT
v.
DOWDALL.*

[*Parke* B. You need not trouble yourself to comment on that case. *Alderson* B. It does not seem to have been much acted upon since.] As to the suggestion (which indeed does not appear to be pressed) that each shareholder might be liable individually, that construction would leave the assured very ill guaranteed; for each shareholder, on being threatened with an action, might pay up his share and so defeat the creditor.

As to *Hatfield*'s plea, every argument that supports the declaration shews this to be insufficient. [*Platt* B. Mr. *Peacock* has not argued in support of this plea.]

Then, on the bill of exceptions, two questions arise. First, whether, on the face of the policy, it appears to be a joint contract by the shareholders; Secondly, whether the defendant *Gooden* authorized the making of such a contract. As to the first point, the language of the policy (already observed upon) speaks plainly: and the subscribing directors profess to sign only as agents for the Company. If the one clause, "And it is declared and agreed" &c. "that the capital stock" &c. "shall alone be liable," has the effect of severing the liability, it is repugnant to the rest of the deed, and cannot avail in opposition to it; *Furnivall v. Coombes* (b). As to the second point, there appears on the bill of exceptions clear evidence for a jury that the three directors who executed the contract were authorized by the shareholders, and, at any rate, that they had authority from *Gooden*, who is stated to have been a director at the time of the execution. The policy appears to have been in the form always used by

(a) 1 *Ca. Chanc.* 204.

(b) 5 *Man. & G.* 736.

the Company. [*Parke B.* It is not stated that the usage was known to the several defendants.] If a body unite

Queen's Bench.
1852.

for the purpose of carrying on insurance, and a particular form of policy has always been used in their transactions, that is evidence against shareholders. [*Parke B.* Not sufficient. The directors carry on all the business.]

HALLETT
v.
DOWDALL.

The importance of that fact depends upon the question how far a joint-stock Company differs from an ordinary partnership as to the authority of members to bind it. In *Smith v. The Hull Glass Company* (*a*), Wilde C. J., delivering the judgment of the Court, says:

"At common law, one of several partners in a trading concern may bind all by a contract made within the scope of matters relating to the partnership. If the partnership is of many, under whatever firm they trade, and whatever regulations they make inter se for managing and conducting the concern, each partner would still have the same power to bind his co-partners. If, then, a co-partnership consisting of a few active and many dormant partners had traded under the firm of *The Hull Glass Company*, the active partners might have bound the rest by contracts made, in the name of the firm, with reference to the co-partnership business. Assume such to have been the constitution of *The Hull Glass Company*, the present case would have stood thus: Some of the partners, who were called directors, managed the concern, the other partners were dormant. The person employed to conduct the operative part of the concern, ordered certain goods, which were delivered on the premises of the co-partners, and consumed there in their business. Is not the accepting and using the goods, some evidence

(a) 8 *Com. B.* 668. 675.

Volume XVIII. that the party ordering had authority from the managing partners to give the order? It would, therefore, be the same as if given by themselves, and would bind the dormant partners.

HALLETT
v.
DOWDALL.

that the party ordering had authority from the managing partners to give the order? It would, therefore, be the same as if given by themselves, and would bind the dormant partners. I am not aware that what is called a joint stock trading Company, if in fact a partnership exist between the shareholders, differs from an ordinary partnership in this respect." And he adds (*a*): "It seems to us that the directors, unless restrained by the Act of parliament" (7 & 8 Vict. c. 110.), "or the deed, would have all the authority given to partners by the rules of the common law. *Prima facie*, they would, as directors, have that authority." [Parke B. Suppose an ordinary Company were notoriously carrying on its business by directors.] On that supposition all persons dealing with the Company would have notice that shareholders who were not directors had no power to bind. Wilde C. J., in the passage first cited, is evidently contemplating the case of an ordinary Company, acting by directors. [Parke B. Did it appear there, as in *Ridley v. Plymouth Grinding & Baking Company* (*b*), that the defendants were a registered joint stock Company?] It did. The rule, from which the present case cannot be withdrawn, is that, in a partnership, a partner may bind for purposes within its scope, unless distinct notice be given that he is not authorized to do so. It would be promoting fraud to hold that, after policies have invariably been issued in a particular form, they may be disavowed by reason of some article in a deed of settlement, the contents of which were unknown to the assured. It is to be observed also here that the policy is recognized by adjustment after the loss. The question of authority is not one of

(*a*) P. 677.

(*b*) 2 Exch. 711.

those appearing by the bill of exceptions to have been raised at the trial. If it had, the point might have been cleared up by evidence. [Parke B. The question is raised as upon the construction of the policy.] On the contract itself the defendants appear to be liable: there is no distinction between them and the subscribing parties, unless it can be denied that those parties were their agents: but whether or not they were so is not a question of construction.

*Queen's Bench.
1852.*

HALLETT
v.
DOWDALL.

If the Court look from the policy itself to the deed of settlement, that confirms the position that the directors were authorized to execute a joint contract. (He then commented upon several passages of the deed.) An important observation is, that the Company is formed with a view of raising 1,000,000*l.* capital, and it is agreed in the indenture that, in every policy to be effected with the Company, the directors shall state that "the subscribed capital of 1,000,000*l.* sterling" and other the stocks &c. shall be liable under the policy. The directors are authorized to pledge a fund of one million. Here a much smaller sum was actually subscribed. If the directors, by authority of the Company, pledge a million, and only half a million is subscribed, the Company must be taken to engage for the other half, or else they sanction a fraud. Both on the deed and on the policy an intention appears to carry on business as a Company, limiting individual responsibility as far as may be possible consistently with that purpose: but, when they enter into contracts which in legal effect are joint, they cannot, by such a form of words as they have introduced into this policy, discard joint responsibility. To do so, they should have stipulated in the contract itself that individuals should not be sued. [Martin B. Are persons to be bound

Volume XVIII. though they expressly say they will not? May not one party declare that he will not be bound, and the other assent to that? And is not this virtually the state of things here?] The words of the policy are the Company's words, and must be taken most strongly against themselves. But, further, if the deed prohibits the directors from binding the members of the Company, but the directors have entered into a contract in the course of the partnership business, which in fact does bind them, the Company are liable to a party who has dealt with them under such contract, not knowing of the restriction: *Hawken v. Bourne* (*a*) is an express authority on this point. *Ridley v. Plymouth Grinding & Baking Company* (*b*) is distinguishable from the present case: there the defendants were a registered Company, and the persons dealing with them had, under stat. 7 & 8 Vict. c. 110., means of ascertaining the contents of their deed of settlement. [*Parke* B. If there were an express authority to the three directors to make a contract in their own names, binding only themselves, and they chose to execute it as binding the Company, would the contract so operate?] It would: *Smith v. The Hull Glass Company* (*c*). [*Talfourd* J. That case is still depending in the Common Pleas, after a second trial (*d*).] The ordinary rule of partnership being that every partner may bind the firm in affairs of the partnership unless he is restricted and the party dealt with has notice of such restriction, the case of a joint stock Company differs from that of a common partnership only in this, that its being managed by directors may be a notice

(*a*) 8 M. & W. 703.

(*b*) 2 Exch. 711.

(*c*) 8 Com. B. 668.

(*d*) See *Smith v. The Hull Glass Company*, 11 Com. B. 897.

HALLETT
v.
DOWDALL

that shareholders who are not directors have no power *Queen's Bench.*
to bind the Company: but it is no notice that the *1852.*
directors have no power or only a limited one; and,
at any rate, the fact of a Company being so managed
is not actual notice: it is only some evidence of notice.

HALLETT
v.
DOWDALL.

[*Alderson* B. If a party has notice that the Company is governed by directors, ought not he to inquire what their authority is?] He may be entitled to assume that (as was said in *Fox v. Clifton* (*a*)) each partner makes the others his agents for the purpose of entering into all contracts for him within the ordinary scope of the partnership business. [*Parke* B. What is the "ordinary scope" of a partnership business of insurance? *Alderson* B. Must not the actual authority be looked to? *Parke* B. I take it as established that, in joint stock Companies, individuals, as such, have no right to bind the partnership, but it rests with the directors. I much question, however, whether the powers of the directors were restricted in this case, and still more whether the point is raised by the bill of exceptions (*b*).]

Peacock, in reply. The question as to notice is decided by the terms of the policy itself, and the reference there to a fundamental principle, that the responsibility of shareholders shall not be pledged beyond a certain extent. Supposing that the contract may be a joint one as it regards the parties signing, it cannot be so on the part of the other shareholders: for parties cannot jointly contract to be liable in different amounts; the contract, if joint, would have made each individual liable for all,

(a) 6 Bing. 776. See p. 792.

(b) As to the consequence of such omission, *Butt* (with *Mellish*) referred to *Bain v. Whitehaven & Furness Junction Railway Company*, 3 Ho. Lords Ca. 1.

June XVIII.
1852.

HALLETT
v.
DOWDALL.

and to the full amount insured. The directors, therefore, have exceeded any authority that could be vested in them, if they have assumed to make a joint contract for the shareholders. The deed of settlement prescribes that the directors shall cause it to be inserted in every policy that the Company's capital and unapplied stock shall alone be liable, and that no proprietor shall be answerable beyond the unpaid part of his share; but they were also to insert "that the directors signing such policy, or any of them, should not be responsible to the person to whom such policy might be issued to any greater extent than the funds or property in their hands or power at the time of recovering upon such policy should be competent to discharge." This clause is not introduced in the present policy. It is said that a fraud is committed by the Company if the directors, under their sanction, profess to pledge 1,000,000*l.* as the subscribed capital, when only 500,000*l.* is subscribed. But, supposing this were so, it does not follow that the proprietors are jointly liable in the terms of the policy; *Jenkins v. Hutchinson* (a). The supposition of a joint liability is so directly opposed to the stipulation limiting each man's liability to the amount of his own unpaid capital, that, if there were a judgment against the Company for 2000*l.*, and two shareholders held to the amount of 1000*l.* each, and one had paid up the whole 1000*l.*, the other nothing, the first might be made answerable to the whole extent of the other's share. [Parke B. He would be responsible for the directors applying the general fund properly, and would be surety for each co-proprietor to the extent of his own unpaid share.] According to the argument for

(a) 13 Q. B. 744.

joint liability, a party suing the directors on such a policy as this might be met by a plea in abatement, shewing that he ought to have sued five hundred shareholders. [Parke B. The answer might be that the plaintiff had the option of suing the directors as the actual contracting parties, or their principals.] The objection that the directors had not authority appears sufficiently by the bill of exceptions. The demurrer does not raise it, because the Court cannot see, upon the record, that the defendants did not personally sign the policy; but then, the facts being proved on the trial, the defendants say that, upon the evidence, assuming it to be true, no action at all lies upon the policy; and, secondly, that, upon the same assumption, no action lies against the defendants jointly.

Cur. adv. vult.

The learned Judges, not being agreed in opinion, now delivered judgment seriatim.

MARTIN B. This was an action on a policy of insurance on the ship *Vindicator*, dated 18th November, 1846, and signed by three directors of a marine insurance company, called "*The General Maritime Assurance Company*." The defendant *Hallett* demurred to the declaration. This demurrer was argued in the Court of Queen's Bench, and judgment given for the plaintiff. There were various pleas by the other defendants: but it is only necessary to refer to the plea of Non assumpsit, which was pleaded by the defendant *Gooden*. The cause was tried, before Lord *Campbell*, at *Guildhall*, when a verdict was found for the plaintiff, and final judgment was afterwards signed against all the defendants. A bill of exceptions was tendered at the trial to

Martin B.

HALLETT
v.
DOWDALL.

Volume XVIII. the direction of the learned Judge; and the whole case
1852. has been brought before us by writ of error.

HALLETT

v.

DOWDALL.

Martin B.

Two points have been made by the learned counsel for the plaintiffs in error: first, that the judgment of the Court of Queen's Bench on the demurrer to the declaration was erroneous; and, secondly, that the direction of the Chief Justice at Nisi Prius was also erroneous.

The declaration stated that the defendants were proprietors and shareholders of and partners in *The General Maritime Assurance Company*; and that the plaintiff made a policy of insurance with the Company; and that it was declared and agreed by and between the Company and the assured that the capital stock and funds of the Company should alone be liable to answer and make good all claims and demands whatsoever under or by virtue of the said policy, and that no proprietor of the said Company, his or her heirs, executors or administrators, should be in any way subject or liable to any claims or demands, nor be in anywise charged, by reason of the policy, beyond the amount of his or her share or shares in the capital stock of the Company, it being one of the original and fundamental principles of the Company that the responsibility of the individual proprietor should, in all cases and under all circumstance, be limited to their respective shares in the capital stock. The declaration proceeded to allege that, in consideration that the plaintiff, at the request of the defendants, had paid to the defendants a certain sum &c., as a premium &c., the defendants promised the plaintiff that they, the defendants, would become and be insurers to the plaintiff of the said sum &c. upon the said ship, &c., and would perform and fulfil all things in the said policy contained on their part, as such

insurers, to be performed and fulfilled; and the defendants then became and were insurers to the plaintiff, and then duly subscribed the policy as such insurers of the said ship. The declaration then contained the usual averments of the plaintiff's interest and the loss of the ship, and proceeded to allege that, although the capital stock and funds of the said Company always, from the time of the making of the said policy hitherto, have been and are sufficient to pay the plaintiff the sum insured, of which the defendants had notice, and were, after the loss, requested to pay the amount insured, yet the defendants have not paid the sum insured, and the same is still unpaid.

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Martin B.

The objection was, that there was no personal obligation upon the defendants to pay. I am, however, of opinion that there is no fatal objection upon the face of the declaration. It is there alleged that the defendants made the promise and subscribed the policy; both of which facts are admitted by the demurrer; and it seems to me that the declaration alleges and imports a direct personal promise by the defendants to pay the amount insured if the capital stock was sufficient for the purpose, and which it was averred in the declaration, and admitted by the demurrer, to have been. The breach is, that the defendants did not perform what, as it appears to me, they admit they promised should be done, viz. the application of the capital stock to the payment of the loss. The cases of *Andrews v. Ellison* (*a*) and *Dawson v. Wrench* (*b*) are directly in point; and I am not prepared to say they were not rightly decided. So, also, the cases of *Gurney v. Rawkins* (*c*) and *Reid v. Allan* (*d*) are to the same effect:

(*a*) 6 *B. Moore*, 199.

(*b*) 3 *Exch.* 359.

(*c*) 2 *M. & W.* 87.

(*d*) 4 *Exch.* 326.

Volume XVIII. and I think that the judgment of the Court of Queen's Bench on the demurrer to the declaration ought not to be reversed.

HALLETT

v.

DOWDALL.

Martin B.

The second question arises upon the bill of exceptions; and the point which has been argued before us is, whether there was any evidence to go to the jury against the defendant *Gooden* upon the issue on the plea of Non assumpsit.

The following was the evidence adduced by the plaintiff: The deed of settlement of the Company, dated 23d *April* 1840, executed by all the defendants; (the parts material are set out in the bill of exceptions); That all the defendants severally and individually held shares in the capital stock of the Company; That the defendant *Gooden* was a director, and held 250 shares of 100*l.* each in the capital stock; That *Brightman, Everard and Chambers* were three directors, and as such signed the policy; The policy itself, which is set out at length in the bill of exceptions; That a total loss was adjusted at 1100*l.*; That 7500 shares had been subscribed for, and were held originally by the defendants and others; That 5000 were so held at the time of the commencement of this suit, the remainder having become forfeited in various ways; That calls had been made to the extent of 25*l.* per share, the last being a call of 10*l.*, made on 29th *September* 1847, but that nothing was paid upon it, although certain directors and proprietors had advanced 10,500*l.* in anticipation of it; That, in *October* 1847, the Company ceased to underwrite policies, but the directors continued to attend the office for some months, when it was given up. On behalf of the defendant *Gooden* it was proved that the Company had not, at the time of the accruing of the causes of action,

or at any after, any money, property or available funds *Queen's Bench.*
in their hands wherewith to satisfy the plaintiff's claim. *1852.*

Upon this evidence the counsel for the defendant *Gooden* submitted that there was no evidence to go to the jury upon the issue on the plea of Non assumpsit. The Chief Justice ruled that there was: and thereupon the bill of exceptions was tendered. The points submitted to the Chief Justice, as stated in the bill of exceptions, were :

HALLETT
v.
DOWDALL.

Martin B.

First, that no action at law would lie upon the policy. Secondly, that the defendants were not jointly liable upon it; but, if liable at law at all, were only liable severally to the extent of the shares held by them individually. Thirdly, that no action would lie against *Gooden*, as he had not signed the policy. Fourthly, that the promise laid in the first count had not been proved, as the promise therein alleged was to be and become an insurer; whereas the only promise was, to pay out of the capital stock and funds if they were sufficient.

In the argument of the learned counsel for the plaintiff in error it was contended: That the partnership created by the deed of settlement of 23d April 1840, was a lawful partnership; that there was nothing illegal in the capital of the partnership being divided into shares, and the partners or shareholders agreeing that no one should be liable to be called on to pay more than the amount agreed to be subscribed by him; that the plaintiff below had agreed with the Company, by an express term contained in the policy, that the capital stock and funds of the Company should alone be liable to make good all claims under the policy, and that no proprietor should be in anywise subject or liable to a

Volume XVIII. claim, made by reason of the policy, beyond the amount of his share or shares in the capital stock, it being one of the original and fundamental principles of the Company that the responsibility of the individual proprietors should, in all cases and under all circumstances, be limited to their respective shares in the said capital stock; that, except as against the individuals who signed the policy, the plaintiff below could not, in any event, maintain an action against more than one shareholder without a violation of the express condition that the liability of each shareholder should be restricted to the amount of his own share and that he should not be responsible for his co-shareholders. It was also contended that no action at law was maintainable on the policy, except against the persons who actually signed it; that in this there was no repugnancy, for that a suit in equity was maintainable against all the shareholders of the Company, and that it was no valid objection to a contract, that, in the event of a breach of it, the proceedings to obtain redress were confined to the courts of equity.

The case of *Reid v. Allan* (a) was cited to shew what was the real nature of the legal liability, as alleged by the counsel for the plaintiffs in error, viz. a separate one, confined to the extent of the shares not paid up; and the cases of *Halket v. Merchant Traders' Insurance Company* (b) and *Hassell v. Merchant Traders' Association* (c) were cited as authorities that the defendant was not liable at all at law.

On the other hand it was contended, on behalf of the defendant in error, that *The Maritime Assurance Company* was a mere trading partnership; that, in law,

(a) 4 Exch. 326.

(b) 13 Q. B. 960.

(c) 4 Exch. 525.

there was no distinction as to liability between a joint-stock partnership, as this is usually called, and an ordinary partnership; that throughout this policy the Company were universally described as the contracting party; and that in this action (there having been no plea in abatement) the plaintiff below was entitled by law to consider every shareholder as the Company, and as if the Company were named as defendants on the record. That the true rule as to partnership liability was that laid down in *Hawken v. Bourne* (*a*), viz. that the partner authorized to make a contract was in the nature of a general agent, and had, by law, authority to bind his co-partners in contracts usually made in the partnership business, although in direct contradiction to the actual authority given by the co-partners; and the case of *Smith v. The Hull Glass Company* (*b*) was cited to shew that there was no distinction between joint-stock Companies and other partnerships.

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Martin B.

The question which arises here is one of great importance. There are very many Companies (life insurance Companies and others) carrying on business under Deeds similar to that in the present instance; and provisions substantially the same as those contained in the present policy are, I believe, universally inserted with the view of restricting the liability of the shareholders. The circumstance that *Gooden* was himself a director will make no difference; for, assuming that the liability of a director who has not signed the policy is different from that of a mere shareholder, there are, in the present case, other defendants who were mere shareholders, and it is quite clear that, in order to fix the defendant

(*a*) 8 *M. & W.* 703.

(*b*) 8 *Com. B.* 668.

Volume XVIII. *Gooden* upon the plea of Non assumpsit, evidence must be given of the liability of all the defendants upon the promise alleged in the declaration. The question of the general liability of the shareholders, therefore, directly arises.

Hallett v. Dowdall.

Martin B.

The first question is, Are the stipulations in the deed, as to each subscriber or partner being responsible only to the amount subscribed for by him, lawful and valid as amongst themselves? I entertain no doubt that they are. Such stipulations have been long in general use; their object is to restrict, as far as possible, the liability of the partners to the same extent as that of shareholders in the various corporations which have for a long period been created by Acts of Parliament for the purpose of effecting great public works. The partners agree amongst each other that each shall subscribe for and be responsible to a certain amount only; and that, in the event of one being compelled to pay a demand, the others will indemnify him separately, and in proportion to the extent of their respective interests, and no farther; and it seems to me clear that, as amongst themselves, when one has paid up the whole amount subscribed for by him, he is no longer responsible to any further amount to his co-shareholders, their liability to each other being precisely the same as that of shareholders in the ordinary joint stock corporations created by Acts of Parliament, in which the subscribers are liable to the extent of their subscriptions only, and, when they have once paid up all their calls, the legal liability to contribute further is at an end.

The further question then arises, what is the liability of shareholders and partners in such companies to third parties upon contracts made by the directors in the

ordinary course of business? And it seems clearly established by the authorities, that, with respect to third persons who have no notice of the terms of the partnership, the shareholders and partners in joint stock Companies are liable to the same extent and in the same manner as the partners in ordinary partnerships; and that the law pays no regard to the stipulations contained in the partnership deed as to the restriction of liability, or to any particular provisions as to the mode of carrying on the business different from that ordinarily used in such concerns.

In the case of *Rex v. Dodd* (a) Lord *Ellenborough*, in delivering the judgment of the Court, stated that the holding out in the prospectus of two proposed trading Companies, one for manufacturing paper, and the other for distilling spirits, that no subscriber would be responsible beyond the amount of the shares for which he subscribed, was a mischievous delusion; that, as amongst the subscribers themselves, they might stipulate with each other for such restricted liability; but that, as to the rest of the world, it was clear that each subscriber was liable to the whole amount of the debts contracted by the partnership. So, also, Lord *Eldon*, in *Carlen v. Drury* (b), stated that he held it to be clear law that each individual in a joint stock brewery Company was answerable for the whole of the debts of the concern.

The case of *Hawken v. Bourne* (c), before mentioned as relied on by the defendant in error, was as follows. The defendant was a shareholder in a Company who worked a mine in *Cornwall*. There were directors of the Company, of whom the defendant was not one.

(a) 9 *East*, 516. 527.

(b) 1 *Ves. & B.* 154. 157.

(c) 8 *M. & W.* 703.

Queen's Bench.
1852.

*Hallett
v.
Dowdall.*

Martin B.

Volume XVIII. There was a stipulation amongst the directors and shareholders, that all supplies for the mine were to be paid for in cash, and that no debt was to be incurred. The order for the goods, for the price of which the action was brought, was given by the purser or agent of the directors, which was the customary course in such concerns. The plaintiff knew nothing of the defendant being a shareholder; but it was not proved that he had any notice of the agreement as to not dealing on credit. It was objected, on behalf of the defendant, that there was no authority in the purser to bind him in a contract upon credit; that there was no liability by reason of the defendant appearing to be a partner, as the plaintiff knew nothing of him; and that, as a contract upon his credit was absolutely forbidden by him to the directors, a purser or agent appointed by them could not have any authority to pledge his credit. My brother *Maule*, who tried the cause, was of opinion that, the mine being worked with the knowledge and for the benefit of the defendant, he was liable on a contract entered into for articles ordered in the usual way of conducting such concerns on behalf of the owners, unless the party ordering them was, in fact, not authorized by the defendant, and the party supplying had notice of that fact. This ruling was objected to in the Court above; but the Court was of opinion that it was right. My brother *Parke* delivered the judgment. He stated that there was evidence that the defendant was a complete partner with the directors in working the mines in the manner in which they were worked; and that one partner, by virtue of that relation, is constituted a general agent for the others as to all matters within the scope of the partnership dealings, and has com-

HALLETT

v.

DOWDALL.

Martin B.

municated to him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in the business in which they are engaged: that any restriction which, by agreement among the partners, is attempted to be imposed upon the authority which one possesses as a general agent for the other is operative only between the parties themselves, and does not limit the authority as to third persons who acquire rights by its exercise, unless they know such restriction has been made; and that, as it was usual to buy the articles in question upon credit, and also to buy them through a purser appointed by the directors, the defendant was liable.

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Martin B.

The judgment in the case of *Smith v. The Hull Glass Company* (a) is to the same effect, and also that in this respect there is no distinction between the liability of partners in joint stock trading Companies and partners in ordinary partnerships.

The result of these authorities therefore is, that, when persons constitute a partnership, whether in the form of a joint stock Company or otherwise, the individual or individuals who are authorized to make contracts for the partnership have authority to bind all the partners in the manner usual and customary in the same trade or business, and even to delegate to others the authority so to bind them, if it be usual so to do, notwithstanding an express agreement not so to deal; and it is, I apprehend, upon this principle that partners in a trading Company, in a business in which bills of exchange are usually issued, can bind their co-partner, notwithstanding the issuing of bills is expressly prohibited by the partnership agreement.

(a) 8 Com. B. 668. See *Same v. Same*, 11 Com. B. 897.

Volume XVIII. In the present case, therefore, if the policy contained
 1852. no notice of a restricted liability, proprietors, shareholders, or partners, by whatever name they may be called, would be liable upon it; for it was a contract made in the way of their business, and by the parties authorized to make such contracts for the Company. But the plaintiff had express notice, on the face of the policy, of the restriction; and he agreed that the capital stock and funds should alone be liable to him, and that no proprietor should be in anywise subject to his claim beyond the amount of his shares; which he would certainly render the defendants liable to if he was entitled to recover on the promise alleged in this declaration; for to hold that the defendants promised as alleged would render them all liable to any extent, and each for the other, which is directly contrary to the restrictive clauses.

It was argued that this view was repugnant to the contract contained in the policy, and that a contract cannot be at the same time made, and a provision inserted that no action shall be maintained in the event of its being broken; and the case of *Furnivall v. Coombes* (*a*) is an authority to this effect.

This may be so: but I think that this principle does not apply to the present case. There are two sets of actions which, in my opinion, may be maintained upon a policy in the present form: first, upon the authority of *Andrews v. Ellison* (*b*) and *Dawson v. Wrench* (*c*), I think that the individuals who sign the policy personally contract that the capital stock or funds of the Company shall be applied to answer the claim on the policy; and,

(*a*) 5 *Man. & G.* 736.

(*b*) 6 *B. Moore*, 199.

(*c*) 3 *Exch.* 359.

secondly, that each individual shareholder may be sued *Queen's Bench.*
and recovered against to the extent of his unpaid sub- *1852.*

HALLETT

v.

DOWDALL

Martin B.

The contract is contained in the policy, which I have no doubt was in a great measure copied from the form of the policy used by the two corporate Companies, *The Royal Exchange* and *The London Assurance*, who were respectively authorized by Act of parliament to insure as Companies or partnerships on joint capital. The policy expressly declares that the capital stock and funds of the Company shall alone be liable to make good all claims under it; and the meaning of this seems to me to be, that the plaintiffs agreed and consented to look, not to the general property of all the shareholders, but to confine themselves, first, to a fund expected to be accumulated from payment by the shareholders of a portion of the sums subscribed from time to time, and the premiums received in the course of business and kept by the directors for the purposes of the current demands upon the Company; and, secondly, as a sort of reserve fund, to the liability of each shareholder, to the extent of his shares not paid up. But the policy proceeds further, and expressly declares that no shareholder shall be liable to any claim, nor be in anywise charged, by reason of the policy, beyond the amount of his shares in the capital stock. Now it seems to me that there is here declared, first, that the shareholder shall be liable to the extent of his unpaid shares; and, secondly, that he shall not be liable further. And to hold the defendants liable in the present action might render them further liable, and would render them jointly liable, which is equally inconsistent with the above provision, which clearly contemplates a separate liability only. The plaintiff

Volume XVIII. was under no obligation to insure with the Company ;
1852. but, as he thought proper to do so, he is, in my opinion,

HALLETT
v.
DOWDALL. bound by the express declaration in the policy. I am
unable to understand how a shareholder can, upon a
contract, or, in other words, by his own agreement, be
rendered liable to an unlimited extent, when he and the
party with whom he has contracted have, as it appears to
me, in the most plain and unambiguous terms, agreed that
he shall be liable only to a limited extent. If this agree-
ment be illegal, it is of course void and of no effect; but
I see nothing illegal in it : and, if it be legal, the proper
duty of a Court of law is to carry it out; and, even if it
were incapable of being carried out, I do not think that
such incapacity would empower a Court of law to impose
upon the shareholders a liability or obligation which they
and the parties with whom they contracted expressly
agreed they should not bear. In my opinion, however,
the contract is capable of being carried out; and, although
the remedy is an inconvenient one, and may possibly
lead to a multiplicity of actions, I see no objection, in
point of law, to a separate action being maintained
against a shareholder to recover from him upon the
policy to the extent of his unpaid shares. Upon a
common marine policy, each underwriter incurs a
separate liability as to a limited amount. Upon the
present policy, I think, also, each shareholder incurs a
separate liability, and to an amount limited to his unpaid
shares. It seems to me that each shareholder authorizes
the pledging of his personal liability to this extent.
This liability is referred to in the judgment of the Court
in *Reid v. Allan* (a): and, as I have already observed, I

see no objection to it in point of law, as it seems to me *Queen's Bench.*
 to be entirely consonant to the intention of the parties, *1852.*
 expressed in their contract. In reality it is an agree-
 ment to perform a contract, with a proviso, that, in the
 event of a breach, the payment to be made in respect of
 it shall be made by each contractor separately, and be so
 much, and no more. In my judgment, it is lawful for
 parties so to agree.

HALLETT
v.
DOWDALL.

Martin B.

It may be observed, that, by the 36th section of the
 Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16.,
 execution may be issued against a shareholder to the
 extent of his shares not paid up, if a judgment against
 the Company cannot be made available against the
 property of the Company; which is a liability very like
 that which I consider to be the contract of the individual
 shareholder in the present case.

The cases of *Halket v. Merchant Traders' Company* (*a*)
 and *Hassell v. Merchant Traders' Association* (*b*) were
 relied upon as authorities directly in point for the
 plaintiffs in error.

By stat. 7 & 8 Vict. c. 110., the Act for the regulation
 of joint stock Companies, provision is made, by the 66th
 section, for the enforcing judgments; and it is enacted
 that execution shall be enforceable, not only against the
 property and effects of the Company, but also, if found
 unavailing, against the person, property, and effects of the
 shareholders. A judgment had been obtained against the
Merchant Traders' Company upon a policy which contained
 a restrictive proviso substantially the same as in the
 present case; and, no satisfaction being obtainable from
 the Company, an application was made for leave to issue

Volume XVIII. execution against a shareholder. The rule was discharged.
1852.

**HALLETT
v.
DOWDALL.**

Martin B.

Lord *Denman* C. J. stated, that the only sensible meaning of the words was, that the assured should look to the funds of the Company alone, so far as any remedy at law extended, and that the individual subscribers should be liable only to contribute to the funds of the Company to the amount of their respective shares; which liability must be enforced by the Company either at law or equity, as the case might be, and which liability might possibly be compelled, by the assured, by some proceeding against the Company. He further stated that the operation of the Act was, not to do away with any special contract entered into with the Company, but only to enable parties who had recovered on a general contract with the Company, not restrictive in its terms, to recover against the individual shareholders. From this judgment it appears that the Court of Queen's Bench considered that no action at all lay at the suit of the assured against the individual shareholders. As I have already stated, I do not concur in this view: but in the case in the Queen's Bench the policy was under seal; and the point was not much discussed at the bar.

The case of *Hassell v. Merchant Traders' Association* (a), in the Exchequer, is precisely to the same effect.

I am, therefore, of opinion that there was no evidence of any joint liability of the defendants to go to the jury, which was one of the points submitted to the learned Chief Justice, and stated in the bill of exceptions; and that the final judgment of the Queen's Bench ought to be reversed.

TALFOURD J. The principal question in this case is, *Queen's Bench.*
whether the policy of insurance, as set forth in the _____
declaration, or as adduced in evidence, sustains a joint
promise whereby the defendants below promised to be-
come insurers to the plaintiff below of the sum insured,
and to perform all things in the policy contained on
their part, as such insurers of the said sum. If such
promise *cannot* consist with the policy set forth, even if
it *were* expressly made by all the members of the Com-
pany, under the circumstances alleged in the record, the
defendants below are entitled to judgment on demurrer:
if it *may* so consist, but is not substantiated by the
policy and proofs adduced, the plaintiff below failed to
establish the affirmative of the issue cast on him by the
plea of Non assumpsit of *Gooden*, and the consequence
must be a *venire de novo*: otherwise, the plaintiff below
is entitled to retain his judgment. I think that the
declaration, which expressly alleges a joint promise,
which avers that the defendants subscribed the policy,
and became assurers, and which *may* import that the
defendants form the entire Company, may be sustained,
for the reasons which will be expressed by my learned
brother *Parke*, and which (as this is not the point that
renders the delivery of separate judgments necessary) I
need not anticipate: but I think the promise stated,
and put in issue by the plea of Non assumpsit, is not
supported by the proof.

HALLETT
v.
DOWDALL.

Talfoourd J.

The policy produced in evidence, headed "*The General Maritime Assurance Company.*" "capital, one million," was not subscribed by the defendants, but by three directors of the Company in which the defendants severally held shares.

The policy in its earlier passages purports to be

Volume XVIII. an assurance by the Company, in terms which, if un-
1852.

*HALLETT
v.
DOWDALL.*
Talfourd J.

qualified, would undoubtedly imply a contract by all its members. But these terms are capable of qualification; and the question is, whether they receive it. Those words might have been followed by stipulations clearly shewing that the capital stock alone was charged with the burthen of the claims of the assured, so as to exclude all personal responsibility at law of the shareholders; and still the general terms of apparent contract would retain their natural signification and force; for the shareholders, by subjecting their funds to the claims of the assured, would become, in the sense thus denoted, assurers.

Supposing this purpose to have been most distinctly expressed, it could not be contended that there were inconsistent intents indicated by the instrument, a general intent by the Company to make a joint contract, and a particular intent to avoid it, and that the general intent ought to prevail, as when inconsistent intents are apparent in a devise; but the language which might mean one thing would be shewn to mean another thing, and a single intent would be adduced, though from apparently inconsistent language.

The clause which explains the sense in which the Company became insurers is as follows: "And it is declared and agreed by and between the said Company and the assured that the capital stock and funds of the said Company shall alone be liable" &c. (His Lordship read the clause, as at pp. 24, 25, ante, to "capital stock.")

In the construction of this clause a question arises preliminary to that immediately in judgment: What is the meaning of the words "capital stock?" Do they imply the capital of "one million," in which the public

are invited to confide, whether paid up or not; or only the funds which may be actually in hand when the loss occurs? On this point the learned Judges who decided the demurrer, and Lord *Campbell* C.J., seem to differ; the former partly basing their judgment on the position that "the fund intended" "must be not the nominal unpaid capital, but an available sum in hand from whatever source derived, and not expended for other purposes" (a); and Lord *Campbell* ruling, on an issue in this case traversing the alleged sufficiency of the capital stock to pay the plaintiff, that the terms mean the entire capital which the shareholders have undertaken to subscribe. I think the ruling of Lord *Campbell* on this point correct, subject to the limitation which I also think the subsequent words introduce.

The policy, having thus denoted to the insured that the fund provided for his indemnity consists only of the entire capital, proceeds further to provide that, inasmuch as the aggregate capital consists of subscriptions from many persons, it is intended to prevent the possibility of those who may contribute their full proportions becoming liable for the failure of others; and therefore in the largest and fullest language limits, or seeks to limit, the responsibility of each individual proprietor to the amount of his shares. How can this purpose be effected but by construing the language as creating at most an individual liability in each proprietor to the extent of his shares? And this can only be effected by regarding the contract, if any except by the subscribing directors, as a contract by each. If the contract is jointly made by all to pay the sum assured by each policy, subject

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Talfoord J.

(a) See the judgment of Mr. Justice Coleridge, in 19 *Law J. (N. S.)*
Q. B. 40.

Volume XVIII. only to the condition that the capital, paid up and unpaid together, shall be sufficient to meet the demands of the assured, it is obvious that any proprietor who may be selected for attack, although he has paid up his full contribution to the stock, may be charged, by executions against his goods or his person, to a ruinous extent; that is to incur the precise mischief against which the language would seem to exempt him. It may be said that great inconvenience would follow from holding each proprietor severally liable to the assured to the amount of his unpaid shares; and this, no doubt, is so; but the probability is, that the parties who have effected insurances on similar policies, thus inartificially framed, have looked to the fund subscribed for, and to its just administration by the directors, and have not contemplated a resort to the individual responsibility of a number of unnamed, and probably unknown, shareholders; unless, indeed, they have regarded (as they may do, on the authority of the Court of Exchequer in *Dawson v. Wrench* (a)) the signing directors as contracting for the truth of the representation of the policy, and for the due collection and administration of the funds of the Company.

Unless the words of the proviso have the meaning it seems to me they bear, I cannot attribute to them any; for, if they import only an internal regulation of the Company, they are foreign to the relations between the Company and the assured; and, if they bear this meaning, I think they are irreconcileable with the joint promise alleged to have been made by the plaintiffs in error.

For these reasons I think the issue on the plea of *Non Assumpsit* is unsupported by the evidence, and that there must be a *venire de novo*. *Queen's Bench.*
1852.

HALLETT
v.
DOWDALL.

Williams J.

WILLIAMS J. I am of opinion that the direction of the Judge to the jury on the trial of this cause was unexceptionable, and that the judgment ought to be affirmed.

Although I have the misfortune to differ from the majority of my learned brethren in this respect, yet we all agree, I believe, in thinking that no objection can be made in support of the writ of error on the ground that the Company (of which the defendants below were proved to be members) did not authorize the making of the policy on which the action is founded. No such point is properly raised on the bill of exceptions. It must, therefore, be taken that it was duly proved at the trial that the defendants below, together with the other members of *The General Maritime Assurance Company*, entered into such a contract with the plaintiff as is constituted by the terms of the policy.

It was, however, contended, on behalf of the defendants below, that those terms do not amount to a joint contract by them and all the other members of the Company, but to a several one with each of them; and consequently that the declaration, being founded on a supposed joint contract, was not sustained by the evidence; and that the Judge ought accordingly to have directed the jury to find for the defendant on the issue joined on the plea of *Non Assumpsit*. But I am of opinion that the terms of the policy constitute a joint contract by all the members of the Company, and that, therefore, this exception fails.

Volume XVIII.
1852.

HALLETT
v.
DOWDALL.
Williams J.

With respect to the form of the policy, the Company, in the ordinary way and in the ordinary form, become the assurers of the ship on the specified terms, and promise to perform those terms, and acknowledge the receipt of the premium as the consideration of their promise; and, but for the introduction of the special clauses hereafter to be considered, this would be the plainest possible case of a commercial association of assurers entering into a contract of assurance for the joint benefit of all the partners, in the ordinary course of their partnership business.

But it is specially stipulated that the capital stock (which in the heading of the policy is stated to be one million) shall alone be liable to answer any claim under the policy; and it has been held in several decided cases (and seems to be undisputed) that, by reason of this stipulation, it is a good plea in bar of any such claim, that the Company have no assets to meet it, inasmuch as they have spent the whole of that capital stock.

There is, however, a further special stipulation, which is said to demonstrate that the contract is not joint by all, but several by each of the members who authorized the policy to be made; viz., it is carefully stipulated that no proprietor shall be in anywise charged by reason of the policy beyond his share in the capital stock; and it is mentioned as one of the principles on which the Company is founded, that the responsibility of the individual proprietors shall, in all cases and under all circumstances, be limited to their shares in the capital stock. It is argued, in support of the writ of error, that this shews that each member contracts, not jointly, but severally, to bear the loss in proportion to his share or

shares. It may be observed, however, (as was pointed out by Lord *Denman* C. J., in giving the judgment of the Court in *Hallett v. Merchant Traders' Company* (a)) that there is no provision that, when a shareholder has paid up the full amount to the Company, he shall not be liable, in proportion to his share, to the assured. His responsibility, it is conceded, is to exist, but is to be limited to the amount of his share; and it seems to follow that he could not be allowed to plead that he is not responsible to that amount because he has paid up the whole of his shares (that payment having been made, perhaps, since the plaintiff's policy was effected, and the money appropriated to claims on the Company which have arisen later than the plaintiff's claim). Suppose, then, an action brought against a single shareholder on the supposed several contract (contained in a Policy such as the present), where there has been an indisputable loss recoverable under the policy. Practically speaking, if the Company were solvent, no defence would be made, and the loss would be paid. But suppose the Company to be insolvent and the capital stock to have been all spent: must the defendant, at his peril, ascertain the amount of the loss, and whether it exceeds the amount of the shares he holds; and, if it does not, confess the action; and, if it does, plead payment of money into Court to the amount of his shares, and, as to the residue, that he is only a shareholder to the amount he has paid into Court?

This seems to be the only course of pleading open, unless, indeed, he had paid up all his shares, and it were competent to him (notwithstanding the difficulties

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Williams J.

Volume XVIII. which I have above suggested) to plead that fact as in 1852. itself a bar to the action. But in neither case would there be any room for the plea in bar which, by the supposition, is afforded by the earlier special clause, viz., that the capital stock of the Company has been exhausted; for that would be altogether immaterial if the defendant's liability is to extend and to be confined to the amount of his own share. The only answer to this difficulty is the proposition contended for by Mr. Peacock, viz., that the signature of the policy by the directors enures to make it a joint contract, on their part, to pay all just claims on the policy, provided the capital stock be sufficient; and that the rest of the Company, who have authorized the making of the policy on their behalf but have not signed it, contract severally, and not jointly, and contract only to pay in proportion to their own shares.

I am, however, of opinion that the signature of the directors has no such operation. It purports merely to testify the contract, and that *the Company* are content with the assurance. And there is nothing in the language, or the nature, of the instrument which indicates that those who subscribe it intend, by reason or by force of their signature, to increase their liability beyond that of the other contracting parties, or to do anything more than to authenticate the instrument as a policy under which *the Company* have become the assurers.

It is not required by law that such a contract should be signed by those who are to be charged by it. I feel it, therefore, difficult to understand how the signature, not being necessary for the validity of the contract, nor in any way of the essence of it, can be capable of varying its meaning or effect; or how either the members who, being directors, signed it, or the other members of the

Company, by whose actual authority such a contract was made, purporting to be made on their behalf, can be at all in a different condition from that in which they would have been if the instrument had not been signed at all, or had been signed by all the members individually, instead of being signed by some of them on the behalf and by the authority of the rest.

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Williams J.

I therefore think that the plaintiffs in error cannot sustain the proposition that the liability of the directors who signed the policy is different from that of the other members of the Company who authorized the signature. And, if their liability be identical, another argument arises against the validity of the plea in an action against a single member, that he has paid up all his shares. For, if this were a good plea, and all the shares were paid up, it is obvious that each member would have a good answer to an action against him; and therefore, unless a joint action could be maintained against all, no action whatever would lie on the policy, notwithstanding the capital stock of the Company were fully sufficient to answer the claims.

Perhaps the proper explanation of the matter is, that this form of policy was introduced in earlier times, when the system of allowing the shareholders to keep back part of the money due on their shares was unknown; and therefore the policy assumes that there is a capital stock of a million, in the sense that every member has actually brought the whole amount of his share into the partnership stock: and it is accordingly stipulated that recourse shall only be had to this fund for satisfaction of all claims under the policy. If, therefore, all the capital stock should happen to be spent, this will be an answer to any such claim in any action, whether brought against

Volume XVIII. all or any of the members: and thus the individual
1852. members, having already contributed the whole amount

HALLETT

v.

DOWDALL

Williams J.

members, having already contributed the whole amount of their shares, cannot be compelled to pay more, or be made further responsible, as they might have been but for these special clauses. If this be so, the whole difficulty arises from the members choosing to sanction the modern practice of allowing part of the capital stock to remain in the shape of money unpaid upon the shares, and thus introducing the question of one member being responsible for another paying up his shares; which could not possibly arise if the theory of such partnerships were carried into due effect, and the capital really existed in the shape of contributed capital stock.

Unless the policy will admit of this construction, I think that the latter special clause must be neglected in construction, as being repugnant to the general effect of the contract, which, in my opinion, is a joint contract of assurance by several assurers. If such a contract contains stipulations restraining the necessary legal consequences of it, they must be rejected as impracticable in law, in like manner as was done in the case of *Furnivall v. Coombes* (a), where the defendants had entered into a personal covenant, and then endeavoured, by the introduction of a proviso, to relieve themselves from all personal liability.

It was also contended, on behalf of the plaintiffs in error, that the Court of Queen's Bench had erroneously given judgment on the demurrer for the plaintiff below. But I am of opinion that the judgment of that Court was right. On this question, however, as I do not differ, I believe, from any other member of the Court, I do not

(a) 5 *Man. & G.* 736.

deem it necessary to explain the grounds of my own opinion.

On these grounds I think the judgment of the Court below ought, in all respects, to be affirmed.

*Queen's Bench.
1852.*

**HALLETT
v.
DOWDALL.**

PLATT B. The declaration in this case is upon a policy of insurance, which policy of insurance contains this clause: It is "agreed by and between the said Company and the assured that the capital stock and funds of the said Company, shall alone be liable" &c. (His Lordship read the clause set out, *antè*, pp., 24, 5, to "shares in the capital stock.") The declaration, having set forth a policy of that description, goes on to charge a general promise on the part of the five defendants, who were shareholders in this Company, only, and the breach assigned is as upon a joint and personal assumption of responsibility by them. To this declaration one of the defendants demurred.

With regard to that demurrer it is sufficient to say that the judgment of the Court may be founded upon other parts of the objections to this record without deciding upon the validity of that demurrer. Upon the question raised by that I have considerable doubt; but another of the defendants has pleaded, amongst other pleas, *Non assumpsit*, raising therefore the question of the promise as stated upon the record, namely, whether he made such a promise or not, or whether there was a joint promise (I should rather say) made by the five defendants in the manner in which it is stated upon the record.

At the trial it was objected that there was no evidence to support that promise, it appearing by the production of the deed of settlement, by the reading of

Platt B.

Volume XVIII. the policy of insurance, and the signing of the directors,
1852. that the premises were not, as was contended on the part

HALLETT
v.
DOWDALL.

Platt B. of the defendant, sufficient from which to draw the conclusion of liability. The manner in which the points are taken is this: that, upon the several matters as produced in evidence, the Chief Justice ought to have directed the jury to find a verdict for *James Gooden* on the issue first joined; first, because no action at law would lie upon the said policy; secondly, that the defendants were not jointly liable upon the said policy if liable at all, but severally only; thirdly, that no action would lie upon the said policy against *Gooden*, inasmuch as he had not signed the policy; fourthly, that the promise alleged in the first count of the declaration is not proved, inasmuch as the promise alleged was a general promise by the defendants to become and be assurers. Those are the points raised. Now it was contended in the course of the argument that this was, in fact, an attempt on the part of partners to do that which the law would not permit; and it seems to me, I own, that that proposition was founded on a fallacy; because there is no magic in a number of persons becoming partners, which will prevent them from acting independently with persons with whom they contract; and the general responsibility, beyond all question, may be modified and varied. If partners jointly contract without in any manner restricting or qualifying their responsibility, there is no doubt they are jointly, personally and generally responsible. So, an agreement among themselves, unknown to the party with whom they contract, would not vary that general liability: but, if the party with whom they contract should, by the terms of the bargain, agree that their responsibility should vary from

the ordinary responsibility, he may be bound and he would be bound by that variation. What objection could be raised to a contract by which four parties agreed to buy of a merchant merchandize upon the terms of one of them paying half the price and the three others paying each a third of the remainder, and by which it was distinctly stipulated between the buyer and the seller that the seller should not be entitled to demand except in the several proportions, and severally against the different partners? Is that an illegal contract? Is the law to make a contract which the parties never contemplated? That is the bargain which they have made; and that is the bargain by which all ought to be bound. It is no answer to say that they contracted as partners, and that by the general law partners are jointly liable. In the case supposed they would not have contracted on that footing. There is a fallacy in the argument that the parties do not contract here upon that footing, they being partners, and, in the case supposed, have contracted but not generally. The terms of the contract would regulate the application of the law provided it did not infringe it by illegality. By these terms the parties assumed, and the seller was content to accept, a qualified and defined responsibility; and what could the seller exact more?

Now upon the evidence it appears that the policy was made according to the deed of settlement; and, according to the deed of settlement, no power whatever was given, to the directors to bind the shareholders jointly and personally. The contract, therefore, which is produced in evidence, and which binds *Gooden* by reason of the signatures of the directors (and that is the only link by which he is connected with the contract

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Platt B.

Volume XVIII. entered into with the assured), is made in pursuance of 1852.

**HALLETT
v.
DOWDALL.**

Platt B.

the power contained in the deed of settlement. Does that power extend to contracts in the general manner in which it is stated in the record where the allegation of the promise is made? Most certainly not. It is no evidence of a contract made by them, unless pursuant to the deed of settlement; no evidence whatever of another contract as alleged upon the record: and for that reason I think that, upon the bill of exceptions tendered to the ruling of my Lord *Campbell* at the trial, upon the objections taken, and which appear upon that bill of exceptions, the defendants, that is the defendant *Gooden*, ought to have had the verdict upon that plea.

With regard to the question whether separate actions may be brought upon this contract against the several shareholders: possibly the contract may be of that description as to enable the parties to sue the persons who sign as directors, or to sue any one of the several parties who would be liable, to the extent of their unpaid contributions to the capital. It is clear that a separate liability of that kind has been sanctioned by the decisions of the courts of justice, because in the Court of Exchequer, and also in the Court of Queen's Bench, the cases that have been cited of *Halket v. Merchant Traders' Company* (a) and *Hassell v. The Merchant Traders' Association* (b) shew that that several liability, and the limitation of the responsibility in respect of the several liability, have been sanctioned by the Courts. However, I do not desire to be bound by any opinion I should form upon this part of the case: still I think there is considerable difficulty in making a contract with two aspects,

and great difficulty as it strikes me, in that respect, as regards this particular contract. Therefore, with respect to that, I beg to be understood as not expressing any opinion; but, inasmuch as the evidence upon the trial, in my judgment, did not support the case upon the plea of Non assumpsit, on that ground I think that the judgment of the Court of Queen's Bench ought to be reversed.

*Queen's Bench.
1852.*

**HALLETT
v.
DOWDALL.**

Platt B.

CRESSWELL J. This was an action against five persons on a policy of assurance. The declaration alleged that the defendants were proprietors and shareholders of and partners in a certain Company called "*The General Maritime Assurance Company*," and that the plaintiff effected a policy with the Company on ship for twelve months. The policy was then set out; and the declaration proceeded to aver that, in consideration that the plaintiff, at the request of the defendants, paid a certain sum as premium for the insurance of 1100*l.*, and undertook to perform all things in the policy on the part of the assured to be performed, the defendants undertook that they would become insurers of the said sum, and to perform all things in the policy on their part, as insurers, to be performed, and then became insurers, and subscribed the policy. The declaration then averred a loss; that the capital stock of the Company was sufficient to pay, but that the defendants had not paid, &c.

On demurrer by one of the defendants, the Court of Queen's Bench decided that the declaration was good. They must, therefore, have held that it disclosed a joint contract enforceable at law. Now, the contract was no otherwise shewn than by the averment that the

Cresswell J.

Volume XVIII.
1852.

HALLETT
v.
DOWDALL.

Cresswell J.

defendants were shareholders of and partners in *The General Maritime Insurance Company*; a recital of the policy, as made between the assured and the Company; and an averment that the defendants promised that they would become and be insurers to the plaintiff of the sum insured, and would perform all things in the policy contained on their part, as such insurers of the said sum, to be performed, and that the defendants then duly subscribed the policy, which would make no difference, for they might very well contract to become insurers without subscribing it; and, if, in the absence of their subscription, it would have been a several and not a joint contract, the subscription would not alter it. The promise is laid merely as a promise to perform what the policy contained on their part to be performed; and, if the policy did not contain anything to be performed by them jointly, the promise would not enure as a joint promise. The natural meaning of the words is, that they promised according to the contract contained in the policy. If the contract was joint, the promise would be joint; if several, the promise would be construed as several. I apprehend, therefore, that the Court of Queen's Bench must have been of opinion that the contract as set out, independently of the promise, was joint; and the language which they are reported to have used is not consistent with any other view of the case. I am of opinion that their judgment was right, and that the declaration shews a joint contract by those who entered into the obligations which it contains, whatever those obligations may be; and that such contract may be enforced by action at law.

Some of the defendants pleaded Non assumpsit, and various other pleas, raising issues, which were tried

before Lord *Campbell* C. J., in *London*; when a bill of exceptions was tendered to his Lordship's direction to the jury on several points, of which it is necessary to observe upon two only.

Queen's Bench.
1852.

HALLATT
v.
DOWDALL.

Cresswell J.

The first question so raised was on the plea of *Non Assumpsit*, viz. whether all the defendants became insurers by the policy, or, in other words, whether the contract of insurance was made in a manner and by persons competent to act for and bind the defendants, being members of and shareholders in the Company. In order to prove the affirmative, the plaintiff put in evidence the deed of settlement, whereby the defendants and others formed themselves into a Company or partnership, by and under the name of "*The General Maritime Assurance Company*," for the purpose of carrying on the business of underwriters of maritime risks.

The policy also was put in evidence. It was issued by the Company, in the form always used by them; and no question was made as to the propriety of issuing policies in that form: and it was signed by three members or shareholders, who were also directors. If the case is looked at as one of an ordinary copartnership, the contract of insurance, having been made by three members of the firm, in the name of the firm, and in the course of the business carried on by the firm, is binding upon all the members. If it is considered in a different point of view because the copartnership appears to be a joint stock Company, and it is considered necessary to shew that the directors had authority by the deed of settlement to make such contract, I think it appears that they had. It was not objected that the policy was not in conformity with the deed of settlement; the directors, therefore, in issuing it, acted

Volume XVIII. within the limits of the authority conferred upon them ;
1852.

HALLETT

v.

DOWDALL.

Cresswell J.

and their contract was the contract of all the copartners, just as much as if each member had signed it. On Non Assumpsit, therefore, it must be held that the defendants entered into the contract alleged in the policy. But on Non Assumpsit it is also said that the declaration is on a joint contract, and that the policy shewed a several contract only, and that there was no evidence of a joint contract. Neither the directors nor any other member of the copartnership had authority to act for the other members, except in their capacity of copartners. They could make no contracts for them as individuals; and therefore the contract in question must either bind them jointly or not at all. The policy was correctly set out in the declaration ; and it has been held on demurrer that the declaration discloses a joint contract, which, as I have already stated, I apprehend is to be collected from the policy as set out, independently of the promise alleged to have been made by the defendants.

Let us look at the terms in which the policy is made. It is headed : “ *The General Maritime Insurance Company:* ” “ Capital, one million ;” importing that it is a policy of the Company. Then, in describing the risks against which the insurance was made, it says, “ touching the adventures and perils which the said Company are contented to bear, and do take upon themselves,” not “ which the members of the Company are contented ” &c., “ and do take upon themselves respectively.” Again: as to the expence of suing, labouring &c. by the assured, it says: “ to the charges whereof the said Company will contribute according to the rate and quantity of the sum herein assured. And it is declared and agreed, by and between the said Company and the assured,” &c.

Again: "And further, it is agreed by the said Company that this writing or policy of assurance shall be of as much force," &c. "And so the said Company are contented and do" "bind themselves and their successors to the assured" "for the true performance of the premises, confessing themselves paid the consideration due unto the said Company for this assurance." Read "copartnership" for "Company," and it would seem impossible to contend that the engagements entered into are not joint.

*Queen's Bench.
1852.*

HALLETT
v.
DOWDALL.

Cresswell J.

I now proceed to consider what the contract entered into is. Undoubtedly it is a contract of insurance. The policy begins by stating that *Bushby & Co.* cause themselves to be assured, and the Company bind themselves for the performance of the premises in the policy (whatever they may be), confessing themselves paid the premium for that assurance. They undertake to insure; and we must look to the earlier part of the policy to see against what they insure: and there the risks usually inserted in such policies are found. Now, by insuring against certain risks, they undertake to indemnify against them. But now we come to the provision, that the capital stock and funds of the Company shall alone be liable to make good demands; which has been construed as a proviso upon the general contract to indemnify, which must, therefore, be read, that the Company undertake to indemnify against the risks enumerated, provided the capital stock and funds are sufficient for that purpose; *Gurney v. Rawlins* (a), *Dawson v. Wrench* (b). This latter action was brought against the parties who signed the policy, but they signed on behalf of the Company generally; and, if they had authority to do

(a) 2 M. & W. 87.

(b) 3 Exch. 359.

Volume XVIII. so, were no more bound than any other members of it.
1852.

HALLETT
v.
DOWDALL.

Cresswell J.

They did not undertake otherwise, or with any more ex-

tensive liabilities, than as members of the co-partnership.

We now come to the consideration of the clause in the policy, that no proprietor of the Company shall be in anywise subject or liable to any claims or demands, nor in any way be charged by reason of *this policy* beyond the amount of his or her share or shares in the capital stock of the said Company, it being one of the original and fundamental principles of the Company that the responsibility of the individual proprietors shall, in all cases and under all circumstances, be limited to their respective shares in the said capital stock. It is not very easy to determine the meaning of this proviso. In considering it, perhaps we should assume that the Company are in possession of the whole of the capital which they profess to have; that is, a capital equal to the whole amount of the shares held by the different members, or, in other words, that the whole has been paid up. If that were so, inasmuch as by the condition in the policy the assured are only to be paid if the stock suffices, if they establish a right to be paid, there must be a fund adequate to make the payment, and any individual proprietor affected by a judgment would have a fund to resort to for indemnity; and the deed of settlement provides for indemnifying the individual proprietor in such cases. If this proviso is construed to mean that the individuals shall have such indemnity, there is nothing in it repugnant to the primary contract contained in the policy. If it is construed so as to compel the assured to sue each separately for his share of the loss, it is repugnant to the original *joint contract* to pay if the funds of the Company

suffice. Again: there is no stipulation that each shall pay only a part of the loss in proportion to his share in the joint stock of the Company, but that he shall not by *this policy* be made liable to more than the amount of his shares. Construing that strictly, any one shareholder might, upon every policy issued by the Company, be compelled to pay a portion of the loss equal to the whole amount of his shares; a situation not much preferable to that from which these defendants seek to escape. I am, therefore, much disposed to think that the clause in question is incapable of receiving any intelligible meaning; and, if insensible or uncertain, it must be inoperative. If it receives any construction other than that which I first suggested, it is repugnant to the contract of insurance entered into by the policy, and therefore void; *Furnivall v. Coombes* (*a*).

If the construction contended for by the defendants is correct, that the policy contains a separate contract by each proprietor only, and that the having paid up the amount of his shares furnishes a good plea in bar to the action, which is a necessary consequence of that construction, it follows that, if all the shareholders have paid up the full amount of their shares, and the whole capital is in the hands of the Company, no action at law can be maintained on the policies issued by them; not against all the members, for the policy contains no joint contract, not against individual members, for each is supposed to have paid up the whole of his share of the capital.

This shews that, even if the contract to pay if the capital stock suffices be several, the proviso is repugnant to it.

I am, therefore, of opinion that Lord *Campbell* was

(*a*) 5 *Man. & G.* 736.

Queen's Bench.
1852.

Hallett
v.
Dowdall.

Cresswell J.

Volume XVIII. right in telling the jury that, upon the evidence, they
1852. might find a verdict for the plaintiff on the issue of Non
Assumpsit.

HALLETT

v.

DOWDALL.

Cresswell J.

On the other point argued before us, viz. whether there was evidence that the capital stock and funds of the Company were sufficient to pay the plaintiff, I think that the direction was right, for that the Company must be taken to have available funds so long as a large portion of the capital stock remained uncalled for.

I think, therefore, that the judgment of the Court below should be affirmed.

Alderson B.

ALDERSON B. It is not my intention to give any reasons for my opinion on the various questions arising out of this writ of error on which we all agree that the judgment of the Queen's Bench is right. Those reasons will be found in the judgments of my learned brethren, and are not necessary to be repeated by me. I shall, therefore, confine myself to that question on which alone I differ from the judgment of the Court of Queen's Bench, and from the opinions delivered by my two learned brethren, *Cresswell* and *Williams*, today.

That point is, whether, looking at this policy, and giving effect to its various provisions, it can properly be said to contain any joint contract between the assured and all the proprietors of shares in the Company. This question arises on Non Assumpsit, in the case of *Gooden*. He has never signed any policy, nor personally made any contract; nor are we bound by the admission that the defendants did jointly contract, as we are in deciding on the demurrer of the other defendants.

The policy is certainly not very accurately framed so as to carry into effect what I cannot but call the very

clear intention of the proprietors, as collected from the deed, which alone gave the directors any authority to bind them.

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Alderson B.

The main intent appears beyond all doubt or dispute in this clause of the policy, by which it is stated that no proprietor of the Company shall be in anywise subject or liable to any claims, nor in anywise charged, by reason of the policy, beyond the amount of his shares in the capital. And then follow these emphatic words: "it being one of the original and fundamental principles of the said Company that the responsibility of the individual proprietors shall in all cases and under all circumstances be limited to their respective shares in the said capital stock." Now, if words can clearly express an intention, these words do so. If, therefore, we can in any way construe this policy so as not to fix each of the several proprietors with a joint liability to the full extent of the claim in all cases of policies thus framed, we shall only be effecting the plain intention of those who framed and those who were parties to this contract.

Let us then see whether the words of the policy prevent us from doing this, when all its provisions are taken together and carefully weighed and examined. And, if this be done, I think we may either construe the word "Company" in this policy as synonymous with the funds of the Company, and the policy as shewing that the directors who sign contract for the rest of the body of proprietors, but so far only that the funds of the Company shall indemnify the plaintiffs and be alone liable in the hands of the body of directors for the claim: Or, if this be not so, and if we must construe this word "Company" to mean individuals for whom

Volume XVIII. the three directors contract, then the meaning may be,
1852. that the individual members of the Company are to be taken as signing each for himself, through his agents, the three directors, for the amount of his shares remaining unpaid, like a body of separate underwriters contracting each through the same broker to insure a ship; and thus we shall make them separately liable to that extent, and so give effect to the declared intention limiting their liability. In either way of construing it, the issue, that *Gooden* and the other individual members of the Company made a joint contract with the plaintiffs, must be found for the defendant *Gooden*. In coming to this conclusion, I am satisfied we carry into full effect the provisions of the deed set out on this record. For, in truth, by the deed, I am satisfied that the three directors signing were really intended to be liable by reason of their signatures, and that the individual shareholders were not to be liable at all.

If we look carefully at its provisions, under which the directors are empowered to bind the defendant *Gooden*, we shall find that it directs all policies to be signed by three directors, and in a given form. It provides that every policy shall state that the subscribed capital and funds of the Company, remaining undisposed of at the time of any claim, shall alone be liable to make it good, adding, affirmatively, that the directors signing such policy shall be responsible to the extent of the funds *in their hands or power*, and, negatively, that no proprietor (obviously there meaning no other proprietor except the directors so signing) shall be liable beyond the amount of his unpaid share. This is the power given. It has been imperfectly complied with in this policy, which states the first and last conditions alone, omitting, how-

ever, that intermediate part of the clause, as to the limited liability of the directors, which, however, appears to me to be of great importance, for it shews, I think, clearly enough, that the policy was only to be made binding on the shareholders provided that the mode in which the proprietors were intended to be made individually liable to the extent of their unpaid shares was properly stated, and that this was to be through the power of the directors to make calls and so to get into their hands the amount of these unpaid shares, and that the directors signing were themselves to be personally liable to the assured to the extent of all the Company's funds either in their hands or in their power; that is to say, of all the funds they held, or, by making calls, could obtain.

It may, therefore, perhaps, be a question whether this policy was binding on *Gooden*, inasmuch as it was not made according to the power given by the deed. For *Gooden* really gave no authority to the directors to make any policy which did not state three things; first, that the funds alone were to be liable; secondly, that the directors signing were to be liable to the extent of the funds in their hands or power; thirdly, that the proprietors were only to be liable to the extent of their unpaid shares; the second clause, if it had been inserted, clearly shewing to the assured, as I think, when coupled with the other two, that the individual proprietors could only be made liable through the directors, and were not to be at all individually responsible to them under the contract made.

This view of the case would, as it seems to me, give full effect to the deed; and it confirms me in coming to

Queen's Bench.
1852.
HALLETT
v.
DOWDALL.
Alderson B.

Volume XVIII. the conclusion at which I have arrived, and convinces
1852. me that I decide this case according to the real meaning
HALLETT and intentions of the parties.

HALLETT
v.
DOWDALL.

Alderson B.

I think, therefore, that the issue on the plaintiffs should have been found for the defendant *Gooden*, and that the judgment of the Queen's Bench is on this point erroneous. The result is that a *venire de novo* must be awarded on the issues. In all the other parts of the case, which, indeed, are the only parts which actually came before the full Court in banc, I agree in the correctness of their decision.

Parke B. PARKE B. In this case some important questions arise, partly on demurrer, partly on a bill of exceptions to the ruling of Lord *Campbell* on the trial of the issues. The pleadings were as follows. (His Lordship then stated them.) On the special demurrer by *Hallett*, the defendant below, to the first count, and on the special demurrs to the first plea of the defendant Sir *James Clark*, and the third plea of the defendant *Allan*, and on the only plea of the defendant *Hatfield*, the question was, whether the first count was bad, either in substance or form, the pleas demurred to being abandoned by the learned counsel for the plaintiffs in error.

The Court of Queen's Bench held the first count to be good; and I think they were right in so holding. The formal objections, the principal of which was the uncertainty whether the defendants became insurers *generally*, and with all the obligations of ordinary insurers, or only insurers *upon the terms of the policy*, I think untenable; for the context clearly shews that the declaration meant to charge them only as insurers by

that policy, with the obligations only which were created by it. The other objection, as to the uncertainty of the time of the promise, is equally unfounded.

*Queen's Bench.
1852.*

HALLETT
v.
DOWDALL.

Parke B.

The objection of substance was, that there was no contract at all made by the policy on the part of any one, but only a charge of the joint stock fund, and available in equity only; and that, if there was a contract, it was not a *joint* one by all the defendants, but a separate one by each, whereby each agreed to be responsible only to the amount of his share in the capital stock, and not for the whole loss if it exceeded it, nor that one should be liable for the non-payment of another's share.

I think the Court of Queen's Bench rightly held that the declaration is good on the general as well as special demurrer.

In the declaration it is averred that the plaintiff paid them a premium, and promised to fulfil and perform everything in the policy contained on the part of the assured to be performed and fulfilled; the defendants promised that they would become and be insurers to the plaintiff for the sum specified, and perform and fulfil all things on their part, as such insurers, to be performed and fulfilled; and there is an averment of the sufficiency of the capital stock of the Company. In considering, therefore, the sufficiency of the declaration on demurrer, we are to assume that a joint contract by all the defendants is *admitted*, and on that assumption to construe the terms of the policy. So doing, I think it amounts to a joint contract that the Company shall pay out of their capital stock; in other words, if their capital stock and funds should be sufficient. In *Dawson*

Volume XVIII. v. Wrench (a) the Court of Exchequer, on demurrer,
1852.

**HALLETT
v.
DOWDALL.**

Parke B. held, in an action on a policy by the same Company, in which the declaration was against the subscribing directors, that this clause had that meaning; and the general course has been, in actions on fire policies, in which there is usually a similar clause, charging the fund, to bring an action as on a covenant or contract by the subscribing directors to pay out of that fund.

The objection, therefore, that in the present case, on the face of the declaration, the policy operated merely as a charge, cannot prevail.

It was, secondly, contended that, taking the declaration altogether, there was no joint promise by the defendants, but only a several and limited promise by each, i. e. to contribute to the amount of his share.

This objection is certainly of more weight than the other, and raises some doubt; for the allegation, that the defendants promised (which, as I have stated, means *jointly* promised) to be insurers on the terms of the policy, is not consistent with one of the terms of it, that no proprietor should be *in anywise subject* to any claims or demands, nor be *in anywise charged*, by reason of the said policy, beyond the amount of his share in the capital stock of the said Company, it being stated to be one of the original and fundamental principles of the said Company that the responsibility of the individual proprietors should, in all cases and under all circumstances, be limited to their respective shares in the said capital stock; for, if there be a joint contract by all the proprietors to pay if the capital stock be sufficient, each

is liable, if the stock be sufficient, to have the full amount of the loss levied upon him; and so he is charged, *by reason of the policy*, beyond the amount of his share. It may be said, therefore, that, where one of the material and alleged fundamental terms of the joint contract is wholly irreconcileable with a joint liability, there is no joint contract at all, taking all the averments in the declaration together.

The sufficiency of the declaration is, therefore, questionable: but, as, upon demurrer, it must be taken that the contract is set out according to its legal effect, we must assume that the defendants did *jointly* contract in the manner alleged; and thus we must either reconcile the apparently inconsistent provision with the joint liability of the defendants to the plaintiff which follows from their joint contract, by supposing that it is a mode of regulating their liability inter se, though unnecessary to be introduced into a contract with the assured; or, if incapable of being reconciled, we must reject it as repugnant and void, as an attempt by the parties to do what by the law of *England* they cannot, contract jointly, with a separate limited liability to damages for the breach of that contract. I therefore think that the judgment of the Queen's Bench on the demurrsers ought to be affirmed.

The next questions arise upon the bill of exceptions. On the trial, the articles of co-partnership were put in, and the policy, which, it was in evidence, was the form always used by the Company (but not stated to be known or approved of by the defendants), and which was subscribed by three directors. This was the evidence applicable to the plea of Non assumpsit by the different defendants who pleaded it.

Queen's Bench.
1852.

HALLETT
v.
DOWDALL.

Parke B.

Volume XVIII.
1852.

HALLETT
v.
DOWDALL
Purke B.

EXCH. CH. HILARY VACATION.

The counsel for the defendant *Gooden* then objected that Lord *Campbell* ought to have directed the jury to find a verdict for him on that issue.

First, because no action at law would lie on the policy, as there was no contract to pay, but only a charge in equity.

Secondly, because the defendants were not jointly liable upon it, but, if liable at all at law, were only severally liable.

Thirdly, because no action would lie against *Gooden*, as he had not signed the policy.

Fourthly, because the promise alleged was general to become insurers to the plaintiff, the promise proved to pay out of the capital stock, in the terms of 1 policy.

Fifthly, because the policy was void by stat. 35 C. c. 63. s. 11.

I have already intimated my opinion, that the first of these objections is untenable.

The third and fifth are equally so: indeed, the which was stated in one of the pleas, was given that plea was admitted to be bad, and as it could but be, after the judgment of Lord *Cranworth* case of *Reed v. Allan* (*a*): and the third is untenable, as it is not necessary that the defendant should give his personal signature by the directors who act on his behalf.

They are shaped in two ways. It is contended that, if the terms of the policy alone are looked at, the legal effect is, that the different proprietors do not thereby contract *jointly* at all; and that, if the policy is construed to be a *joint* contract of all the proprietors, the directors had no authority from the proprietors to make such a policy for them.

*Queen's Bench.
1852.*

HALLETT
v.
DOWDALL.

Parke B.

As to the second branch of this argument, the authority expressly given by the deed was certainly not pursued, and that in more than one respect. One difference is, that in the policy the stock or funds generally are pledged; in the deed, the power is to pledge only the funds *undisposed of* at the time of the *claim* under the policy, and that the directors ought to state that limitation in the policy, which they have not done; and, further, that no shareholder should be liable beyond the *unpaid* part of the share.

There is no evidence that this particular form of policy, so deviating from that directed by the deed, was sanctioned by the defendants: and whether unchartered companies of assurance against marine risks (which companies did not exist before stat. 5 G. 4. c. 114., and of the usage of which no evidence was offered) are on the footing of ordinary partnerships, so that an authority to the directors would be implied as to all strangers to the real authority, is a question on which I need not on the present occasion express any opinion; first, because I think that the want of authority in the directors to make policies binding on each proprietor was not objected to in a distinct manner, as it ought to have been, the only objection really made being that the defendants were not jointly liable on that policy, and that the policy was not *signed* by the defendant *Gooden*;

Volume XVIII. and, secondly, because I think that, looking at the policy
1852. alone, and construing every part of it together, so as to give effect as far as is possible to its different provisions, it does not contain any *joint* contract with the assured by all the proprietors, and consequently no joint contract by the defendants.

HALLETT
v.
DOWDALL.

Parke B.

In construing the instrument itself, we are not embarrassed by the admission of the fact, which on the demurrer was necessarily assumed, that the defendants did *jointly* contract. The question on the evidence is, whether they did. Nor are we to assume that the defendants duly subscribed the policy as assurers, which on the demurrer is admitted. This also is a question to be determined on the construction of the instrument. What, then, is the legal effect of the policy, which is unquestionably a very confused and inartificial instrument, very difficult to understand, probably copied in a great measure from one of those used by the chartered insurance Companies, and perhaps without understanding its meaning?

The policy states that *the Company* are to bear the adventures and perils therein mentioned; to bear also the expenses of salvage; and the three directors subscribe in witness that *the Company* are content with the insurance; and it is declared and agreed between the Company and the assured, that the capital stock and funds of the Company shall alone be liable to make good all claims and demands whatsoever by virtue of that policy; and then follows the most important clause: that no proprietor of the Company shall be in *anywise* subject or liable to any claims nor in *anywise* charged, by reason of the policy, beyond the amount of his share in the capital, it being one of the original and *fundamental*

principles of the said Company that the responsibility of the said proprietors shall in *all cases* and under *all circumstances* be limited to their respective shares in the capital stock. It is impossible to doubt that the object of this clause (which, it is to be observed, is stronger than that in *Halket v. Merchant Traders' Company* (a)) was to protect the proprietors from personal responsibility to any persons whatever beyond a limited amount. It is emphatically stated to be *the original and fundamental principle* of the Company: and in construing their instrument we must give effect to this provision, so clearly expressed, if we can consistently with the other provisions contained in it. I think we can do this by construing the term "Company" to denote the funds of the Company, which alone are to pay, or by holding that it means not the whole body collectively, so as to make the whole body joint contractors, but each individual of the Company, so as to make each of them to contract to bear the loss in the same proportion as his share bears to the total capital, in the nature of a separate underwriter; and we thus give effect to the declared fundamental principle of the Company, which we could not do where it is to be construed in conjunction with an admitted joint contract of all the proprietors, which it must be when the question arises on demurrer.

It is true that there may be difficulties in ascertaining how much each is to pay in the case where an assurer has already been obliged to contribute to other losses; but a similar sort of difficulty would exist if all jointly undertook to pay out of the capital stock ; if the capital stock had already been reduced by the payment of prior

Queen's Bench.
1852.

HALLITT
v.
DOWDALL.

Parke B.

Volume XVIII. claims, the residue only would be the capital liable to
1852.

HALLETT

v.

DOWDALL.

Parke B.

pay. But whatever difficulty might arise on this ground the assured must suffer; for I think it quite clear that the individual proprietors were never meant to be responsible for any others than themselves.

I think it unnecessary to decide whether the subscribing directors were responsible on their policy, by reason of their signature, as contracting parties, or not; all I think it necessary to decide is, that there was no evidence, in this confused and ill drawn instrument, warranting the Judge to say that there was any *joint contract* by the defendants with the plaintiff as alleged in the declaration. It may be that there is no contract at all; but, at all events, I think there is no *joint contract* by the proprietors who are not directors, with the plaintiff; and therefore Lord *Campbell* ought to have directed a verdict for *Gooden on Non assumpsit*; and, if so, all the other defendants were entitled to the benefit of that verdict.

This makes it unnecessary to discuss the last question, whether the direction of Lord *Campbell* was right as to the meaning of the terms "capital stock and funds;" but I do not mean to intimate that I think the ruling in that respect was not correct, though it is not the same that the Judges of the Queen's Bench appear to have put on those terms, according to the report in 19 *Law J.* (*N. S.*) *Q. B.* 37(a).

Therefore I think judgment should be affirmed on demurrer.

Judgment affirmed on the demurrer. *Venire de novo* on the issues.

(a) And pp. 11—14, antè.

*Queen's Bench.
1852.*

ELLEN BLAKE, administratrix &c. of JOHN BLAKE,
deceased, *against* The MIDLAND Railway Com-
pany.

CASE. The declaration stated that, before and at the time of the committing of the grievances after mentioned, and after the passing of an Act &c. (7 & 8 Vict. c. xviii., local and personal, public), "To consolidate the North Midland, Midland Counties, and Birmingham and Derby Junction Railways," defendants were the proprietors of a certain railway, to wit *The Midland Counties Railway*, and were then possessed of certain engines, trucks and carriages used on the said railway in carrying and conveying passengers and goods, and such other matters and things as might be offered for that purpose, from a certain place, to wit *Derby*, to a certain other place, to wit *Sheffield*, for hire and reward to defendants in that behalf: and defendants, being such proprietors, and so possessed of the said engines &c., as aforesaid, heretofore and after the passing of the said Act &c., and before and at the time of the committing of the grievances next mentioned, and in the lifetime of John Blake (the intestate), to wit on 19th May, A.D. 1851, received him the said J. B. into one of the said carriages on the said railways as a passenger, to be carried and conveyed thereon by defendants as such passenger on a certain journey, to wit from *Birmingham* aforesaid to *Sheffield* aforesaid, for reward to defendants in that behalf; and by reason thereof it became the duty of

In an action, under stat. 9 & 10 Vict. c. 93., by the wife, husband, parent or child of a person killed by misfeasance, the jury, in estimating damages, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only.

And, the Judge, in such a case, having left it in the option of the jury to give damages on all or any of these grounds, though intimating his opinion that there was no ascertainable damage on any ground but the last, a new trial was granted for misdirection.

Decisions of the Scotch Courts are received as authority here, if the law on

which they turn be common to *England* and *Scotland*.

Volume XVIII. defendants to use due and proper care and skill in and about the conducting, carrying and causing the said *J. B.*

1852.
BLAKE
v.

MIDLAND
Railway
Company.

to be carried on his said journey, to wit from &c. to &c. aforesaid, as such passenger on the said railways: Yet defendants, not regarding their duty in that behalf, heretofore, to wit on the day and year aforesaid, did not nor would use due and proper care and skill in and about the conducting, carrying and causing the said *J. B.* to be conveyed on his said journey, to wit from &c. to &c. as such passenger on the said railways, but then took so little care, and conducted themselves so negligently, improperly and unskilfully in and about the carrying and conveying the said *J. B.* on his said journey, and in conducting, guarding, managing and directing the carriage in which he was such passenger as aforesaid, and the train to which the same was then attached, and the engines whereby the said train was then drawn upon and along the said railway, and also then took so little care, and conducted themselves so negligently, improperly and unskilfully in and about the managing and directing a certain other train, called, to wit, a luggage train, of the defendants, and then consisting of divers trucks, to wit 100 trucks, and a certain other engine of defendants then drawing the said last mentioned train upon and along the said railways, that, by reason of such carelessness, negligence, default and improper conduct of defendants in that behalf, the said train called &c., and the said engine so drawing the same as aforesaid, then with great force and violence ran and was driven into, upon and against the said carriage in which the said *J. B.* was such passenger as aforesaid, and into, upon and against the said train to which the said last mentioned carriage was so attached as aforesaid; and the

Volume XVIII. negligence and improper conduct in managing their railways and certain carriages," &c. "on the evening of 19th May, 1851, near the *Clay Cross* Station, a certain collision took place, whereby he the said *J. B.*, then being a passenger in a certain passenger train of the defendants on their railways, was hurt and wounded, and afterwards, in consequence of such hurts and wounds, in about one or two hours, died."

BLAKE
v.
MIDLAND
Railway
Company.

On the trial, before *Parke* B., at the *Derbyshire* Summer Assizes, 1851, it was admitted, on the opening of the case, that a verdict must pass against the defendants, and that the only question was as to the amount of damages. The learned Judge then said that, according to a rule which had been several times acted upon by the Lord Chief Baron at *Nisi prius*, and which in his own opinion was a right one, the measure of damages under the statute must be the pecuniary loss, and that only. The plaintiff's counsel, in the course of the cause, contended that the estimate ought not to be confined to the money damage, but should include the suffering and loss in other respects: and evidence was given of the terms on which the deceased and his wife had lived together. The defendants' counsel having again insisted upon pecuniary loss as the only measure of damages, *Parke* B. said: "I cannot say to the jury that this is the only thing; I can only give them my notion of it, and they must settle it themselves." And, in his summing up, he stated to the jury that, at common law, an action founded on estimate of a life was not maintainable; that, by statute, it now was, and a jury might give such damages as they considered to have been sustained: that he thought there was great difficulty in fixing any measure but that of pecuniary injury: but

that, if they considered the plaintiff entitled to any compensation for the bereavement she had sustained, beyond the pecuniary loss, they were to make their estimate accordingly.

The deceased had been a partner in a mercantile house, deriving an income from the profits of the trade, as well as from some permanent sources of revenue. The whole was calculated at 850*l.* a year. The learned Judge suggested to the jury, as a mode of estimating the pecuniary loss, to take so much per annum of that sum as a wife living with her husband and maintained according to her station in life might be supposed to enjoy; and, considering this as an annuity, to reckon its value at so many years' purchase as it was worth, reference being had to the ages (34 and 26) of the husband and wife: then to deduct from this gross value the amount in money which the wife would become entitled to by the death of her husband (namely, his share of the partnership profits for a term of from four to five years, according to the deed of partnership, and dower upon his real property): and to award the balance (which his Lordship reckoned at about 6000*l.*) as compensation under the statute. It was objected that in this estimate allowance was not made for certain contingencies which might have lessened the annual amount supposed to be enjoyed by the wife during her husband's lifetime; and the learned Judge admitted that these ought to be considered, though it was difficult to estimate them; and, subject to these observations, he left the case to the jury, who found a verdict for the plaintiff with 4000*l.* damages.

Queen's Bench.
1852.

BLAKE
v.
MIDLAND
Railway
Company.

Sir F. Kelly, in the ensuing term, moved for a new
VOL. XVIII. N. S. H

Volume XVIII. trial, on the grounds: first, that the damages, if calculated on pecuniary loss only, were excessive; that the jury had not been directed with sufficient exactness on this head by the learned Judge, and that deductions, not pointed out by him, should have been taken into calculation; and, secondly, that the Judge should have expressly directed them to take nothing into consideration in the assessment of damages but pecuniary loss; the statute not allowing compensation for any other loss, or for mental suffering. A rule *Nisi* was granted. In this vacation (*a*),

Sir *F. Thesiger*, *Mellor*, *Miller* Serjt. and *Flood* shewed cause. It must be admitted that the verdict cannot stand if the Act, 9 & 10 Vict. c. 93., gives compensation for pecuniary loss only. That statute enacts, by sect. 1, that, whenever the death of a person shall be caused by such wrongful act, neglect or default as would have enabled the party injured, if living, to recover damages by action, the person who would have been liable in that case shall be liable to an action for damages notwithstanding the death: and, by sect. 2, "that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before

(*a*) February 10th. Before Lord *Campbell* C. J., *Patteson*, *Coleridge* and *Wightman* Js.

mentioned parties in such shares as the jury by their verdict shall find and direct." Under the former law there could be no action for damages if death ensued; though a pecuniary imposition was made in some cases by way of deodand. That, however, was abolished (*a*) a few days before the passing of the Act now in question. [Lord *Campbell* C. J. Deodand was taken where the mischief happened without any negligence, but by pure accident (*b*): a strange peculiarity.] The kind of remedy here sought was given by the Civil law, and is familiar in the law of *Scotland*, which country is in express terms excluded from the operation of the present Act by sect. 6, the Legislature apparently considering that, by this statute, the law of *England* was simply assimilated to the existing law of *Scotland*. Indemnification to the relatives in the case of death by criminal acts was known in that country by the name of assythment (*c*); but an action for damages was maintainable there in the case of death by misconduct generally: and the damages were not measured by pecuniary loss only. It is said in *Ersk. Inst.* 592, note 13: "Solatium for wounded feelings is allowed in cases of breach of promise of marriage." "So also where damages are sought for the loss of a father, husband, &c., through the improper negligence or misconduct of a party, they are not to be estimated merely by the pecuniary advantages which the family derived from his exertions in business; but a solatium will be given, even where 'the death of the sufferer, instead of being a loss to his family, might be regarded as a benefit, on account of his bank-

Queen's Bench.
1852.

BLAKE
v.
MIDLAND
Railway
Company.

(*a*) Stat. 9 & 10 Vict. c. 62.

(*b*) See *Regina v. Polwart*, 1 Q. B. 818.

(*c*) See *Ersk. Inst.* 1074. B. 4. Tit. 4. s. 105. Ed. 1828.

Volume XVIII. ruptcy and dissipated habits;" for which *Black v. Caddell* (*a*) and *Brown v. Macgregor* (*b*) are cited. In *Children of Forrest v. Clerkington* (*c*) compensation by way of assythment was made to illegitimate as well as to legitimate children. The law of assythment is treated of in *Bell's Principles of the Law of Scotland*, p. 749, 4th ed., where this remedy is said to be given by the law "both as indemnification and as solatium." In *Duncan v. Findlater* (*d*), which came before the House of Lords on appeal from the Court of Session, before the passing of stat. 9 & 10 Vict. c. 93., the respondent, whose son had been killed by the alleged negligence of the appellants (turnpike trustees), recovered 500*l.* damages in the *Scotch* court, as a solatium for the death of his son. The liability of the trustees was disputed on the appeal: but Sir John Campbell, Attorney General, for the appellant, admitted that, although, by the *English* law, if a man's wife or son were killed by negligence, he could have no action, because "the *English* law allows no solatium in this respect," "the *Scotch* law" "says more sensibly, that in such a case a solatium shall be granted to the person injured in his happiness and circumstances by the death of his wife or child." It is reasonable to suppose that the Act of Parliament subsequently passed for *England* contemplates an equally extensive remedy. On a similar principle to that of the *Scotch* law, it has been held in our Courts that for a battery of the wife the husband may sue without joining her as a plaintiff, in respect of the loss and damage sustained by him from the want of her company and aid; *Guy v. Livesey* (*e*),

(*a*) *Dict. Decis.* Vol. 31 & 32, p. 13905.

(*b*) *Fac. Collect.* Feb. 26. 1813. P. 232. 233.

(*c*) *Dict. Decis.* Vol. 31 & 32, p. 13903.

(*d*) 6 *Cl. & Fin.* 894.

(*e*) *Cro. Jac.* 501.

BLAKE
v.
MIDLAND
Railway
Company.

Queen's Bench.
1852.

BLAKE
v.
MIDLAND
Railway
Company.

Hyde v. Scyssor (a). In the case of seduction, a parent is allowed to recover compensation for the injury to his feelings. [Coleridge J. There must be a loss of service.] In the class of cases where a husband recovers for ill treatment of his wife, neither loss of service nor expence of medical attendance need be proved. *Blackstone*, 3 *Comm.* 139, treating of "injuries that may be offered to a person considered as a husband," mentions the remedy claimable by him solely, where the loss is of the wife's consortium. The gist of the action for criminal conversation is (as Lord *Kenyon* lays it down in *Weedon v. Timbrell* (b)) "satisfaction" to the husband "for a civil injury done to him" by depriving him of the comfort and society of his wife. In *Winsmore v. Greenbank* (c), which was an action for enticing away and detaining the plaintiff's wife, Willes C. J., referring to the objections taken in arrest of judgment, said: "The second general objection is, that there must be *damnum cum iniuriâ*; which I admit:" but he adds afterwards "here is a consequence laid, that by means thereof the Plaintiff lost the comfort and society of his wife, and the profit and advantage of her fortune" &c. If, in the case of a wife, the mere loss of society be an injury for which damages may be assessed, the wife being still alive, a wife may recover on the same principle for a wrong which takes from her the society of her husband; and it makes no difference that the same wrong has caused his death, the common law objection on this ground being removed by the Act of Parliament. By sect. 2 of this statute, the action is to be for the benefit of the "wife, husband, parent and child" of the deceased; and, by

(a) *Cro. Jac.* 538.

(b) 5 *T. R.* 357.

(c) *Willes*, 577.

Volume XVIII. sect. 5, "the word 'parent' shall include father and mother, and grandfather and grandmother, and step-father and stepmother." But it is, comparatively, seldom

BLAKE
v.
MIDLAND
Railway
Company.

that these relations, the remoter ones at any rate, suffer pecuniary loss in the case contemplated; the inference is that not this only, but family feeling, was considered in the enactment. It may be argued from the provision in sect. 2, giving the action to the executor or administrator of the deceased, that the wrong is considered solely as affecting the pecuniary estate. That it affects the estate may be one reason for this enactment: but the executor who acts on this ground may well be chosen to enforce the other redress also: and, as there would often be many persons entitled to it under the Act, it was expedient that one individual should be selected to act for all, according to their respective claims. Sect. 4, which requires the plaintiff to deliver a particular "of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered," seems to contemplate something more than a simple estimate of pecuniary loss. [*Coleridge* J. Suppose one man is killed, leaving a wife, children, father and mother; a second is killed leaving only a wife: all other circumstances being the same, should larger damages be recovered in the first case than in the last?] Clearly they should. [*Patteson* J. If a husband sues for the injury by loss of consortium, must he sue as administrator to his wife?] He would sue merely in a nominal capacity: the act in such a case allows the party to be named as executor merely that there may be one dominus litis. [*Wightman* J. In the cases of seduction and criminal conversation, bad character is given in evidence

to reduce the damages. Could the same be done here ? *Coleridge* J. In the case of a daughter, evidence is given of the father's character, and of the kind of house he kept. Lord *Campbell* C. J. It might be, in a case like the present, that the husband had deserted his wife and children, and was a curse to his family.] In estimating solatium all the circumstances must be considered. The inquiry may be difficult; but that does not affect the principle. Evidence was given here of the terms on which the husband and wife lived.

There is, indeed, a reported case at Nisi prius, to which allusion seems to have been made in moving for this rule, where the present Lord Chief Baron is said to have laid it down that, in an action under this statute, the question was confined to pecuniary loss; *Gillard v. Lancashire & Yorkshire Railway Company* (a). A widow there claimed compensation for the loss of her husband; and the plaintiff's counsel proposed to prove that, after the husband's death, she was delivered of a child which, in consequence of the shock she had suffered, was sickly in constitution. This was objected to as introducing a kind of injury for which the widow, who sued on her own account solely, could not ask compensation: and *Pollock* C. B. said: "It is a pure question of pecuniary compensation, and nothing more, which is contemplated by the Act." "I think it is utterly impossible for a jury to estimate any sum as a compensation for the injured feelings of the survivors; all that is left which is appreciable after the death of the party killed is the pecuniary loss sustained by his family, and this Act enables them to recover that which the deceased would himself have sued for, had

Queen's Bench.
1852.

BLAKE
v.
MIDLAND
Railway
Company.

(a) 12 *Law Times*, 356. Court of Exchequer, December 20th, 1848.

Volume XVIII. the accident not terminated fatally. The framers of the
1852.

BLAKE
v.
MIDLAND
Railway
Company.

Act never could have meant to give compensation to the parent for the mere deprivation of his son, or the widow for that of her husband. If that were so, a man of wealth losing his only child, the heir of his honours and fortune, and the object of all his human hopes, might be entitled to claim an almost indefinite sum. Nothing on earth could compensate such a man for such a loss. This shews that the Act could never have been intended to apply to anything beyond the mere actual pecuniary compensation." The plaintiff's counsel observed: "In that view, a widower would not be entitled to sue for compensation for the loss of the society and comfort of his wife:" and the Lord Chief Baron said: "Clearly not, unless her death is the cause of a pecuniary loss to her husband." But the learned Judge entertains views which perhaps may be deemed peculiar on the subject of compensation for personal suffering. When at the bar, his Lordship, as counsel for the plaintiff in *Carpue v. London & Brighton Railway Company* (*a*), avowedly withdrew from consideration as a subject of damages the bodily suffering which the plaintiff had undergone; the party himself concurring in the adoption of this view. Such, however, has not been the general course in actions of this kind by parties still living. Again, in *Armsworth v. South Eastern Railway Company* (*b*), an action on the statute by a widow on behalf of herself and her children, *Parke B.*, in summing up, said: "A very great difficulty presents itself; for you cannot estimate the value of a person's life to his relatives. No sum of money could compensate a child for the loss of

(*a*) 5 Q. B. 747.; where, however, this circumstance is not stated.

(*b*) 11 Jurist, 758. *Croydon Summer Assizes*, 1847.

its parent; and it would be most unjust if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done. Here you must estimate the damage by the same principle as if only a wound had been inflicted. Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life; and in the present case you are not to consider the value of his existence as if you were bargaining with an annuity office; for in that view you would have to calculate all the accidents which might have occurred to him in the course of it, which would be a very difficult matter. I therefore advise you to take a reasonable view of the case and give what you consider a fair compensation." But difficulty is no ground for narrowing the operation of a statute framed to introduce an important remedy: and the difficulty is not greater than that which occurs in other cases, libel for instance, where the gist of the complaint is an injury not affecting mere pecuniary interests. The statute itself does not use any language confining the remedy to pecuniary injury. Had that been intended, no more was necessary than to insert the word "pecuniary" before "injury" in sect. 2. An analogy may be drawn from the practice adopted by the Courts under stat. 4 Ed. 3. c. 7. Before that Act (as the clause recites) executors could not sue "for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life." By cap. 7 it is enacted that the executors in such cases shall have an action against the trespassers," and recover as the testators might have done if living. And, as is observed in 1 Williams on Executors, 669 (4th ed.), "The Act 4 Ed. 3.

Queen's Bench.
1852.

BLAKE
v.
MIDLAND
Railway
Company.

Volume XVIII. being a remedial law, has always been expounded
1852. largely: and though it makes use of the word trespasses
only, has been extended to other cases within the mean-
ing and intent of the statute." Upon the same principle
stat. 9 & 10 Vict. c. 93. ought rather to be extended
than restricted in the construction.

BLAKE
v.
MIDLAND
Railway
Company.

Humphrey, Macaulay and Boden, contrà. The learned Judge ought to have told the jury in express terms that the inquiry should be limited to pecuniary damages. His charge (if not otherwise exceptionable) had the generality which was complained of in *Elliott v. South Devon Railway Company* (a), where the issue was, whether or not the railway passed through a "town" within the meaning of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20. s. 11., and the Judge told the jury that the word "town" was to be understood in its ordinary and popular sense; and that it was for them to decide whether the plaintiff's land was in a "town," within the meaning of the Act; and a new trial was granted. And, the learned Judge here having at first intimated an opinion that pecuniary damage only could be recovered, the defendants' counsel were led to omit points in cross examination which they might otherwise have urged. [Lord Campbell C. J. Were you instructed to shew by cross examination that the deceased and his wife lived on very bad terms?]

As to the main question: This is an Act to be guardedly construed, as it introduces a new principle. [Lord Campbell C. J. So did stat. 4 Ed. 3. c. 7.] The only "injury resulting from such death" which the Court can notice, under sect. 2, is pecuniary loss. The attempt

(a) 2 Exch. 725. See *Regina v. Cotte*, 16 Q. B. 412.

to carry this provision further leads to difficulties which *Queen's Bench*.
 shew that it cannot have been intended. Suppose the _____
 deceased person to leave a wife and twelve children: _____
 the pecuniary injury they suffer by the loss of his pro-
 tection is apportionable: but, if each is entitled to com-
 pensation for mental suffering, every one is entitled
 alike to the full amount which can be supposed equiva-
 lent to one person's distress of mind. Is then the de-
 fendant in such a case to pay full damages twelve times
 over? The only safe ground of estimate is the loss in
 pecuniary estate. And here the widow is in some
 respects a gainer. [Coleridge J. Your construction
 would make the killing, in some instances, no injury at
 all.] Another question is, whether, in such a case as
 this, habitual misconduct of the husband could be alleged
 in reduction of damages. [Lord Campbell C. J. The
 answer may be that, if the wife asks damages for loss
 of society, such evidence is let in: if an executor is so
 indiscreet as to claim for the loss of a father whose
 removal is a benefit to the family, he must take the con-
 sequence.] None of the suggested difficulties will arise if
 the injury be regarded as pecuniary. [Lord Campbell
 C. J. There may be a power to claim ultra that, but
 no obligation upon the executor to prefer such claim.
 He is to do what is best for the estate.] It is suggested
 that "pecuniary" might easily have been inserted before
 "injury" in sect. 2, if the Legislature had intended such
 a restriction: but the word is not necessary. In *Hal-
 ford v. Kymer* (a), which turned upon stat. 14 G. 3.
 c. 48. s. 1., forbidding insurances upon lives in which
 the assured has "no interest," this Court held it clear

BLAKE
 v.
 MIDLAND
 Railway
 Company.

Volume XVIII. that "no interest" must be read as "no pecuniary interest." The whole context of the present Act agrees with the interpretation contended for. The relatives for whom compensation is provided by sect. 2 are those most likely to be in a situation of pecuniary dependence on the deceased. If distress of mind on the loss of a near relative had been contemplated, brothers and sisters would have been mentioned. The particular in this case (which the plaintiff is required to deliver by sect. 4) gives no intimation of any thing beyond a pecuniary claim. [Lord *Campbell* C. J. No objection was made here on that ground.] An analogy can scarcely be drawn from the cases in which a husband may sue at common law for loss of consortium: that analogy did not prevail even under the common law; for a wife could not recover compensation in respect of consortium, even when husband and wife were both living.

Cur. adv. vult.

COLERIDGE J. (*a*), in the same vacation (*February 21st*), delivered the judgment of the Court.

This case turns entirely upon the construction of the recent statute, 9 & 10 Vict. c. 93.; and the important question is, whether the jury, in giving damages apportioned to the injury resulting from the death of the deceased to the parties for whose benefit the action is brought, are confined to injuries of which a pecuniary estimate may be made, or may add a solatium to those parties in respect of the mental sufferings occasioned by such death?

The plaintiff's counsel, in support of the latter alternative, have mainly relied upon certain decisions

(*a*) *Coleridge and Crompton Js. were the only Judges in Court.*

of the Court of Session in *Scotland*, which they have very properly brought under our notice. If those decisions had been pronounced upon a law common to both parts of the United Kingdom, we should have been equally ready to be bound by them as if they had been pronounced by the Courts in *Westminster Hall*; but it is expressly enacted that stat. 9 & 10 Vict. c. 93. shall not apply to *Scotland*; and the *Scottish* law of assythment is wholly alien to the common law of *England*. In this, as in other instances, an improvement in our law may have been suggested by the existing code in *Scotland*; but may have been adopted with modifications. It is quite clear that the law of assythment has not been introduced into *England* in its full latitude; or compensation for the loss of a parent by a wilful act, neglect, or default, would be due to illegitimate as well as legitimate children; and the amount of compensation would depend upon the extent of the culpa proved against the parties from whom the compensation is claimed. It may be, though we need not affirm it, that those decisions are in strict conformity to the law of *Scotland*, and would all have been affirmed on appeal to the House of Lords; but they can be of very little assistance to us in construing this Act of Parliament. When we are performing this duty, our only safe course is to look at the language which the Legislature has employed.

The title of this Act may be some guide to its meaning: and it is "An Act for compensating the families of persons killed;" not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases the newly given action may be maintained although death has ensued;

Queen's Bench.
1852.

BLAKE
v.
MIDLAND
Railway
Company.

Volume XVIII. the argument being that the party injured, if he had recovered, would have been entitled to a solatium, and therefore so shall his representatives on his death. But it will be evident that this Act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles. Sect. 2 enacts that "in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family. This language seems more appropriate to a loss of which some estimate may be made than to an indefinite sum, independent of all pecuniary estimate, to soothe the feelings; and the division of the amount strongly leads to the same conclusion: "And the amount so recovered" "shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct." By what rules ought the jury to be guided in this apportionment? Are they to inquire into the degree of mental anguish which each member of the family has suffered from the bereavement? Then not only the child without filial piety, but a lunatic child and a child of very tender years, and a posthumous child on the death of the father, may have something for pecuniary loss, but cannot come in pari passu with the other children, and must be cut off from the solatium. It seems to us that, if the Legislature had intended to go the extreme length of giving, not only compensation for pecuniary loss, but a solatium to all the relations enumerated in sect. 5, a father and mother, a grandfather and

BLAKE
v.
MIDLAND
Railway
Company.

grandmother, a stepfather and stepmother, a son and daughter, a grandson and granddaughter, a stepson and stepdaughter, language more clear and appropriate for this purpose would have been employed.

An argument has been drawn from sect. 4, which requires the plaintiff to deliver the particulars of the nature of the claim in respect to which damage shall be sought to be recovered; as if it were so much for pecuniary damage and so much for solatium. But these words will be abundantly satisfied by a statement of the manner in which the pecuniary loss to the different persons for whom the action is brought is alleged to have arisen.

We conceive that the Legislature would not have thrown upon the jury such great difficulty in calculating and apportioning the solatium to the different members of the family without some rules for their guidance. When an action is brought by an individual for a personal wrong, the jury, in assessing the damages, can with little difficulty award him a solatium for his mental sufferings alone, with an indemnity for his pecuniary loss. There may be a calculation of the pecuniary loss sustained by the different members of the family from the death of one of them: but, if the jury were to proceed to estimate the respective degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of defendants. We must recollect that the Act we are construing applies not only to great railway Companies but to little tradesmen who send out a cart and horse in the care of an apprentice.

For these reasons we are of opinion that the learned Judge at the trial ought more explicitly to have told the

Queen's Bench.
1852.

BLAKE
v.
MIDLAND
Railway
Company.

Volume XVIII. 1852. jury that, in assessing the damages, they could not take into their consideration the mental sufferings of the plaintiff for the loss of her husband: And that, as the damages certainly exceeded any loss sustained by her admitting of a pecuniary estimate, they must be considered excessive.

BLAKE
v.
MIDLAND
Railway
Company.

The rule for a new trial must therefore be absolute. It is a new trial on the ground of misdirection.

Rule absolute.

RENSHAW *against* BEAN.

Plaintiff, being reversioner of a house which adjoined premises in the occupation of defendant and had ancient windows, rebuilt the house, added an upper story, opened windows in that story, and enlarged the ancient windows and otherwise altered their position: such rebuilding and alterations being within twenty years of the commencement of the action. Defendant subsequently rebuilt his premises, and thereby darkened the windows in both the upper and the lower stories of plaintiff's house.

Held, in an action by plaintiff, as reversioner, for this obstruction, that, the plaintiff having, by his alterations, exceeded the limits of his right, and it being, through the nature of such alterations, impossible for the defendant, in the lawful exercise of his own rights, to obstruct such excess without at the same time obstructing the plaintiff's former right, the plaintiff must be considered as losing his former right, at all events until he restored his house to its original condition.

Sembler, that such alteration did not destroy the right altogether.

Held, further, that a defence founded upon the fact of such alteration by the plaintiff, and the impossibility of a partial obstruction, was properly raised under a traverse of plaintiff's right to the windows.

Queen's Bench.
1852.

RENSHAW
v.
BEAN.

tion of one *George Shelton Jun.* as tenant thereof to plaintiff, the reversion of and in the said several premises then and still belonging to plaintiff; and in which several and respective premises, before and at the times of the committing &c., there were and still of right ought to be divers, to wit ten, windows, through which the light and air during all the time aforesaid ought to have entered, and until the time of the committing &c. did enter, and still of right ought to enter, into the several premises hereinbefore respectively mentioned and in the occupation of plaintiff's said tenants respectively, for the convenient and wholesome air and occupation and enjoyment thereof: Yet defendant, well knowing the premises, but intending to injure plaintiff in his reversionary estate &c., whilst the said several premises were so occupied by the respective tenants thereof, and plaintiff was so interested therein as aforesaid, to wit on &c., and on divers other days &c., wrongfully and injuriously rebuilt and raised and added to a certain messuage, building and premises of defendant near to the said windows respectively, and made the same of a much greater height and dimensions than the same had previously been, and wrongfully and injuriously kept and continued the said last mentioned messuage, building and premises so wrongfully added to and raised as aforesaid for a long time, to wit &c.; by means of which said several premises the light and air during all the times aforesaid were and still are prevented from entering into and through the said windows or any of them into the said respective premises so in the possession of plaintiff's said tenants respectively, in which plaintiff was so interested as aforesaid; and the same

Volume XVIII. premises have been and are thereby rendered dark,
1852. close, uncomfortable and unwholesome, and much less

~~RENSHAW
v.
BEAN.~~ fit and commodious for habitation &c.; and the same
have been and are greatly deteriorated in value; and
plaintiff hath been and is greatly injured in his rever-
sionary estate and interest &c.: to the damage &c.

Pleas. 1. Not Guilty.

2. That there were not of right, at or during any or
either of the said times of the committing &c., any or
either of the said windows through which the light or
air ought to have entered, or still of right ought to
enter, in manner and form or for the purpose in the
declaration alleged. Conclusion to the country.

Issue was joined on each plea.

On the trial, before Coleridge J., at the *Nottingham*
Spring Assizes, 1851, a verdict was found for the
plaintiff with 1*s.* damages, subject to the opinion of
this Court upon the following case.

The premises in the occupation of the plaintiff's
tenants, mentioned in the declaration, adjoin to each
other; and the windows in question open into a court
or passage (*a*) leading out of the *High Pavement* in the
town and county of *Nottingham*. The defendant was
the owner of premises very near, and in parts adjoining,
the plaintiff's premises, and situate on the opposite side
of the said court or passage. The defendant rebuilt,
enlarged and raised his premises shortly before the
action was brought, and thereby darkened and ob-
structed the windows on the ground floor, first floor
and second floor of the premises in the occupation of

(a) See the judgment of the Court, p. 130, post.

the plaintiff's tenants: and the only question in dispute
is as to the right to the windows in question.

*Queen's Bench.
1852.*

RENSHAW
v.
BEAN.

The premises in the occupation of the plaintiff's tenants had been rebuilt about eighteen or nineteen years before the rebuilding of the defendant's premises; and none of the identical windows in respect of which the action was brought had existed for twenty years before the obstruction complained of. In the premises which previously occupied the site of the plaintiff's present premises there was the same number of stories as in the present premises; and there were windows on the ground floor, first floor and second floor, which had existed for a period considerably exceeding twenty years; but in rebuilding the plaintiff's premises some of the windows were enlarged, and the situations of others were changed; and no one of the present windows was in all respects identical in point of size and situation with any one of the previously existing old windows.

The defendant contended that by these alterations, the nature of which is hereafter specified, the ancient rights had been lost, and that no new rights had been acquired, in consequence of the period of enjoyment of the present windows falling short of twenty years; and that therefore he was entitled to a verdict upon the second plea, which denied the rights alleged in the declaration: and this is the point for the consideration of the Court.

The case then referred to a plan which, it was agreed, might be referred to by the Court, and on which were shown the premises in the occupation of plaintiff's tenants, and the windows now in question, all of which looked into the before mentioned court, some to the North, some to the East, and two to the South. They

Volume XVIII. were numbered on the plan, 1 to 12. Windows 1 to 7
1852.

RENSHAW
v.
BEAN.

were in premises occupied by Mr. *Booth Eddison*; 8 to 12 lighted a warehouse, counting house and premises in the occupation of Mr. *George Shelton*. The case stated that all were in a greater or less degree darkened and obstructed by the rebuilding and alteration of the defendant's premises. It then proceeded as follows.

When the premises occupied by Mr. *Booth Eddison* were rebuilt, the new building was made nine or ten feet higher than the old one, and the height of the rooms of all the floors was raised; and, as a consequence of this alteration, the windows in all the floors were all made and placed somewhat higher than they were in the old premises, and other changes were made as hereinafter particularly mentioned. On the ground floor, the window No. 1 was in exactly the same situation as an old window previously existing there, except that the new window was made about four inches narrower and about one foot higher than the old one. With respect to the window No. 2, the wall in which it was made stood in the same situation as the present wall, but there were two windows previously lighting the room now lighted by No. 2. These old windows were narrower windows than the present window, and were separated from each other by about eighteen inches of wall. The present window occupies the situation of this intervening piece of wall, and a part of the situation of each of the old windows; but the outer sides of the old windows extended farther towards the North and South respectively than the present window. The sill of the present window is at the same elevation from the ground as the sills of the former windows; but the top of the present window is about a foot higher than the top

of the old windows. The room which is lighted by No. 2 is now a breakfast parlour and library. In the old building it was used as a counting house. With respect to the window No. 3, the wall in which it is placed stands in the same situation as the old wall; and the present window, to the extent of about one third of its dimensions, occupies the same situation as part of an ancient window in the previous building: the sill is at the same elevation; but the top of the present window has been raised so as to be about a foot higher than the top of the old window in that situation: the space occupied by the remaining two thirds of the present window was occupied by part of a brick wall in the old building. The room now lighted by this window is used as a surgery. In the old premises there were two rooms in the same situation, a packing room and a pantry, each lighted by a separate window; and at the time of the alteration one of these old windows was stopped up. With respect to the windows Nos. 4, 5, 6 and 7, they occupy nearly the same positions as four ancient windows previously existing in the former premises; but, in consequence of the raising of the floors of the present building, the cills and tops of the present first floor windows are higher than those of the previous windows: but the greater portion of each of the present windows is in the same situation as the corresponding old window; and the use made of the rooms and places lighted by these windows is substantially the same in the new as it was in the old premises.

With respect to the windows to the plaintiff's warehouse and premises in the occupation of Mr. *George Shelton*, the windows numbered 8, 9 and 10 occupy nearly the same situations as three ancient windows

Queen's Bench.
1852.

RENSHAW
v.
BEAN.

Volume XVIII. previously existing in the former premises, except that,
1852. in consequence of the floors having~~s~~ been raised in

RENSHAW

v.

BEAN.

height, the cills and tops of the present windows are higher than the cills and tops of the old windows; but the greater portion of each of the present windows is in the same situation as the corresponding old window on the second floor; and the rooms lighted by the present and former windows were used for the same purposes. With respect to the remaining windows Nos. 11 and 12, which look down the yard towards the South, the wall and building in which these two windows are placed was, at the time of the rebuilding of the premises, raised and brought forward towards the South about eight feet beyond the situation of the old wall. The windows 11 and 12 were placed in the new wall so brought forward as aforesaid in pretty nearly the same situation, with respect to elevation, as two old windows in the same situation which previously lighted the staircase of the old building; but, in consequence of the wall and building in which the staircase stands having been so brought forward, no part of the present windows occupies any part of the situation of the old staircase windows. And, in consequence of this part of the building having been brought forward, the windows of the warehouse and counting house, Nos. 8, 9 and 10, and also the windows of Mr. *Eddison's* surgery and bedroom over it, Nos. 3 and 7, were deprived of some of the light which had previously been enjoyed by the windows that formerly stood in similar situations in the old premises.

The rebuilding of the plaintiff's premises was completed in or shortly after the month of *October*, 1831: and the several lights had been enjoyed in their altered

state without interruption until about the months of *August* and *September*, 1850, when the defendant's *obstructions* took place.

Queen's Bench.
1852.

RENSHAW
v.
BEAN.

The question for the consideration of the Court is, Whether the plaintiff is entitled to recover damages in the present action in respect of the obstruction of all, or any, and which, of the windows in question; and the verdict is to be entered accordingly. The Court to have the power of determining any question of fact arising from the case, and which (but for this power) they might consider proper to be submitted to a jury. The pleadings to be referred to as part of the case.

The special case was argued in last *Hilary* term (*a*).

G. Hayes, for the plaintiff. As to the windows 11 and 12, which have been advanced in the form of a bow, no part of them coinciding with the former site, it must be admitted that *Blanchard v. Bridges* (*b*) is a decisive authority for the defendant. With respect to the other windows, which have been altered chiefly by elevating the upper part, in consequence of the raising of the plaintiff's house, but which, to a great extent, merely occupy the former site, the easement is modified, not extinguished. The principle, to be deduced from *Luttrell's Case* (*c*), is, that an easement is not destroyed by alterations in the mode of enjoyment, which leave the substance of the thing enjoyed the same, and do not impose a greater burden upon those against whom the easement is claimed. And therefore, in the case of enlarged windows, the old apertures remaining, the

(*a*) January 27th, before Lord Campbell C. J., *Patteson and Wightman* Js.; and 28th, before Lord Campbell C. J., *Patteson, Coleridge and Wightman* Js.

(*b*) 4 *A. & E.* 176.

(*c*) 4 *Rep.* 86 a.

Volume XVIII. former privilege continues as to them, though not as to
1852.

RENSHAW
v.
BEAN.

new additions. In a case of *Dougal v. Wilson* (*a*), cited by Mr. Serjt. *Williams* in note (2) to *Yard v. Ford* (*b*), *Wilmot* C. J. said: "If my possession of the house cannot be disturbed, shall I be disturbed in my lights? It would be absurd. But the action can only be maintained for damages so far as the lights originally extended, and not for an increase of light by enlarging the windows recently." In *Cotterell v. Griffiths* (*c*), which was an action for obstructing window lights by erection of a paling, "the windows had never been completely open, but had had blinds fastened to the window frames, which prevented the plaintiff from seeing into the defendant's garden, the blinds sloping upwards, and only serving for the admission of light;" and the defence was, "that the plaintiff had thrown down those blinds, and thereby opened a full and uninterrupted view over the defendant's premises and thereby deprived him of the privacy and retirement of his garden." It was admitted that the paling made the plaintiff's rooms darker than they were before the blinds were removed; and Lord *Kenyon* thereupon held that the plaintiff was entitled to recover. That is a stronger case than the present. In *Martin v. Goble* (*d*) a malt-house had been converted into a parish work-house; and, in an action for obstructing the lights, it was held that, notwithstanding this alteration, the premises were still entitled to as much light as was formerly enjoyed for the purposes of the malt-house. In *Chandler v. Thompson* (*e*), a small window in the plaintiff's house, overlooking the defendant's premises, was enlarged

(*a*) 2 *Wms. Saund.* 175 *a*, 6th ed.

(*b*) 2 *Wms. Saund.* 172.

(*c*) 4 *Esp. N. P. C.* 69.

(*d*) 1 *Camp.* 320.

(*e*) 3 *Camp.* 80.

in height and width : the defendant erected a building which covered part of the old aperture but allowed more light to enter than had been enjoyed in the former state of the window. But Le *Blanc* J. "was of opinion that the whole of the space occupied by the old window was privileged ; and that it was actionable to prevent the light and air from passing through this, as it had formerly done. That part of the new window which constituted the enlargement might be lawfully obstructed : but the plaintiff was entitled to the free admission of light and air through the remainder of the window, without reference to what he might derive from other sources." The first case in which it has been laid down "that a party may so alter the mode in which he has been permitted to enjoy this kind of easement, as to lose the right altogether," is *Garrett v. Sharp* (*a*) ; and there the circumstances were peculiar. The light had formerly been admitted through crevices in a barn, which the plaintiff had, by cutting, formed into windows. It was very doubtful whether the crevices had not been accidental, and, consequently, whether the enjoyment of light through them was any evidence that an easement had ever been granted to the plaintiff. In *Thomas v. Thomas* (*b*) the plaintiff alleged a right to have the rain flow by a certain channel from the roof of his house to the premises of the defendants, which easement they had obstructed by building a wall on their ground: the defendants answered that the plaintiff had lately raised the wall from which the rain so descended, by an additional three feet : and it was argued that "the exercise of an easement is an infringement upon the

Queen's Bench.
1852.

RENSHAW
v.
BEAN.

(*a*) 3 *A. & E.* 325.

(*b*) 2 *Cro. M. & R.* 34. S. C. 5 Tyr. 804.

Volume XVIII. right of another, and must be strictly pursued:" and
1852. that, here, "the alteration in the enjoyment of the right

RENSHAW
v.
BEAN.

destroyed it, and the defendants were justified in building up their wall, as they would have been in case no easement whatever had existed." But the Court of Exchequer held that the plaintiff was entitled to recover. *Alderson* B. said: "How does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he lawfully may claim? It has been held in the case of lights, that where a party enlarges an ancient window, the owner of the adjoining land cannot obstruct any part of the light which ought to pass through the space occupied by the ancient window. If the act of the defendants is injurious to the plaintiff's original right, it is not the less so, because it is injurious also to a further right which the plaintiff claims." Subsequently to this case *Blanchard v. Bridges* (*a*) was decided, in which the Court of Queen's Bench, recognising the authority of *Chandler v. Thompson* (*b*), admitted that, where a window was merely enlarged, the original aperture remaining, "that aperture remained privileged as before the enlargement." The argument, if it could prevail, that the easement of window light ceases on any change, however trivial, in the dimensions of the window, would be of very serious consequence, especially in ancient towns.

Mellor, contrà. By the general rules of common law, any man may build to the extremity of his own land: if that right is ever restrained it is by an enjoyment which he has permitted another person to have during

(*a*) 4 A. & E. 176.

(*b*) 3 Camp. 80.

twenty years, incompatible with that exercise of right. *Queen's Bench.*
But the question then is, in what enjoyment has he

1852.

acquiesced? To what precise extent has he given up his rights, and made his own tenement a servient one?

RENSHAW
v.
BEAN.

The enlargement of windows may affect the neighbouring land-owner very materially, both as abridging his right to elevate his own buildings, and as lessening the privacy of his tenement, a privilege on which the law puts a value as well as upon the access of light and air; *Cher-rington v. Abney* (a), and *Garratt v. Sharp* (b), where Lord Denman C. J. observed, as to the conversion of crevices into windows: "They might overlook the neighbouring premises." If the new work is an encroachment, the party invaded in his rights may obstruct the encroachment; and, if it has been so made that the obstruction cannot operate upon what is unprivileged without also affecting what is privileged, that consequence must be submitted to: all may be obstructed. And, as was observed in the judgment of this Court in *Blanchard v. Bridges* (c), if there be an encroachment, the degree of it cannot safely be left to the consideration of a jury. [Lord Campbell C. J. You would say that an inch ought to have the same consequence as several feet.] An inch might be a matter too small to be estimated by the law: but the question is, whether it can be perceived that the alteration imposes some new burden upon the neighbouring tenement: if it does, the obstruction may be total. [Lord Campbell C. J. Where a window is heightened, it might be difficult to obstruct the upper part without darkening the lower.] In a case which was tried at *Lincoln*, something of the

(a) 2 *Vern.* 646.(b) 3 *A. & E.* 325. 328.(c) 4 *A. & E.* 191.

Volume XVIII. kind was attempted, by an iron plate at the end of a rod.
1852.

RENSHAW
v.
BEAN.

But the true consequence of the encroachment is, that the party making it incurs the penalty of losing his right. It is not practicable, in a case like the present, to obstruct merely what is in excess; and, if it remains unobstructed for twenty years, an adverse right is gained. Nothing, therefore, has been done here which was not necessary for the purpose of preventing a wrong. This view of the subject agrees with the doctrine stated in *Gale on Easements*, 191 et seq. (a). [Lord Campbell C. J. A very excellent book.] It is said in *Luttrell's Case* (b): "If there be lord and tenant, and the tenant holds to cover and repair the lord's hall, as in 10 E. 3. 23. in this case if the hall falls, yet if the lord builds the hall in the same place where it was before, and of such bigness as it was before, the tenant is bound to cover it; but if it is of greater length or breadth so as prejudice may come to the tenant, or if it is built in another place, or if that which was the hall is converted to a cowhouse, stable, kitchen, or the like, he is not bound to cover it, for the lord by his act cannot alter the nature of the tenure, nor of the service which the tenant ought to do." The same principle applies here, though the excess is not capable of being so exactly measured. In *Perkins's Profitable Book*, 128 (c), sect. 671, it is said: "If a man be seised of the manor of *Dale* in fee, and another man holds of him as of his manor of *Dale*, to cover the hall, or other house of the manor; if the house fall and be not re-edified by the space of seven years, or for a greater or less time, now for this time the tenant who held by such service is discharged thereof: but when

(a) 2d Ed.

(b) 4 Rep. 86 b.

(c) 15th Ed.

such house is re-edified, the tenant is bound to do the service, except it be rebuilt longer or larger, so as it shall be more chargeable to the tenant to cover the house, than it was at the time the tenure was created: and if the house be in such manner re-edified, *quare*, if the tenant shall be bound to cover so much thereof as shall amount to the length and breadth of which it was when the tenure was created," &c. And in a note by the editor it is added: "From what is laid down in *Luttrell's Case* (*a*), *Bruerton's Case* (*b*) and *Talbot's Case* (*c*), it follows that this service, being entire and for the private benefit of the lord, shall not be apportioned by his act; and therefore that the tenant is not bound to perform it in part." The lord, by trying to increase the service, incurs the penalty of losing it. This subject is also discussed in *Gale on Easements*, 373, 4, 5, where the author says: "It is admitted by the Court of King's Bench, in the case of *Garratt v. Sharp* (*d*), that 'the mode of enjoying an easement might be so changed as to defeat the right altogether; and it would seem, on principle, that this consequence should ensue, at all events to the above extent, wherever a material injury is caused to the owner of the servient tenement by the alteration, and the original and usurped enjoyments are so mixed together as to be incapable of being separately opposed. If such increased enjoyment would clearly narrow the servient owner's original right of building or otherwise acting on his own property, his tenure is damned; for though, in strictness of law, he may still build, provided he do not injure the original easement, he can now do so only under the condition of

Queen's Bench.
1852.

RENSHAW
v.
BEAN.

(*a*) 4 *Rep.* 86 a.

(*c*) 8 *Rep.* 104 b.

(*b*) 6 *Rep.* 1 a.

(*d*) 3 *A. & E.* 325.

Volume XVIII.
1852.

RENSHAW
v.
BEAN.

being subject to the opinion of a jury, on a question so nice as that, whether the building in question, clearly injurious as it would be to the usurped right, be or be not so to the original right." It is further observed that, all easements being a restriction on the natural right of property, in a contest between the owners of dominant and servient tenements "the liberty of the latter is more favourably regarded" "than the attempts of the former to limit it;" and therefore, even supposing an action to lie at his instance after he has changed the mode of enjoyment, he must shew, in order to succeed, "that the obstruction to the usurped was clearly an interference with such original right; and also, if this were made out, it should seem, he should further shew that the usurped portion was capable of being obstructed without disturbing the original easement." The right to have air and light admitted to a building is acquired and kept alive by enjoyment; if the enjoyment be voluntarily discontinued, it is a question upon evidence whether or not the right has been abandoned: *Moore v. Rawson* (a). As *Littledale* J. observed in that case, less than a twenty years' disuse will shew such an abandonment. "If" (his Lordship said) "a man pulls down a house and does not make any use of the land for two or three years, or converts it into tillage, I think he may be taken to have abandoned all intention of rebuilding the house; and, consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does anything to shew that he did not mean to convert the land to a different purpose, then his right would not cease." If the

(a) 3 B. & C. 332.

Queen's Bench.
1852.

RENSHAW
v.
BEAN.

windows do not occupy the same space, the presumption of abandonment is not repelled. That the right of enjoying this kind of easement, being deduced from the acquiescence of the adjoining owner, must be commensurate with it, was pointed out by *Patteson* J., delivering the judgment of the Court, in *Blanchard v. Bridges* (*a*). "The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions and in the same position), which existed at the time when such consent is supposed to have been given." "If it were once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence." In *Martin v. Goble* (*b*) the precise question now before the Court was not raised; but the effect of the decision is, that the occupier of the dominant tenement is not entitled to do any act which imposes an additional restriction on the servient tenement. In *Cotterell v. Griffiths* (*c*) the character of the alteration did not clearly appear; so that it was not shewn whether it was impossible, as in the present case, for the defendant to obstruct those parts of the windows which had been recently added without also obstructing the ancient lights. The decision there, however, is inconsistent with the doctrine laid down in later cases, and in *Gale on Easements*, (*d*) 374, 5, where the decision in *Cotterell v. Griffiths* (*c*) is questioned.

(*a*) 4 *A. & E.* 191.

(*b*) 1 *Camp.* 320.

(*c*) 4 *Eop. N. P. C.* 69.

(*d*) 2d Ed.

Volume XVIII. *Thomas v. Thomas* (*a*) adds nothing in favour of the plaintiff, beyond the authority which attaches to a dictum of *Alderson* B. in the course of the argument. It

RENSHAW
v.
BEAN.

did not appear there that the usurped portion of the easement could not be obstructed without obstructing the original easement: and, further, the jury, as Lord *Abinger* stated (*b*), had found that there had been an adverse enjoyment for twenty years of the whole easement. Here the plaintiff, by his own act, has made it impossible to separate the usurped and the original parts of the easement; and the defendant is therefore entitled to treat the whole as usurped, according to the rule laid down in *2 Blackst. Comm.* 405, and acted upon in *Ward v. Eyre* (*c*) and *Lupton v. White* (*d*): and, consequently, as the usurped portion has been enjoyed for only eighteen years, it must be held that the whole easement has not been enjoyed for more; and therefore the question of adverse possession cannot arise. [Lord *Campbell* C. J. If the plaintiff had, since the obstruction, restored the windows to their former condition, would the defendant have had any defence?] Perhaps not, beyond the fact that the defendant's house had been altered before such restoration. [Lord *Campbell* C. J. In *Scotland*, disputes of this kind are settled by an officer who has some of the functions of a Roman Aedile.]

G. Hayes, in reply. The argument which has now been urged on behalf of the defendant was not raised at the trial. It is only matter of excuse, and does not touch the real issue, which is upon the right to the windows,

(*a*) *2 Cro. M. & R.* 34. *S. C.* 5 *Tyr.* 804.

(*b*) *5 Tyr.* 810. (*c*) *2 Bulstr.* 323. (*d*) *15 Ves.* 432. 439.

as alleged in the declaration. Such a defence should have been pleaded by way of confession and avoidance, the plea stating that the windows had been enlarged, and that it was impossible to obstruct a part without obstructing the whole. But, further, the rule which has been suggested, that where such impossibility exists the whole easement may be obstructed, was not adopted in *Martin v. Goble* (*a*) or *Cotterell v. Griffiths* (*b*), in both of which cases this defence might have been raised. *Hall v. Swift* (*c*) is a direct authority against the doctrine that an alteration of the easement, however slight, destroys it altogether. [Lord Campbell C. J. The question whether the alteration is material is for the jury.] The submitting of such questions to a jury must be attended with great difficulty, as was observed in *Blanchard v. Bridges* (*d*). [Lord Campbell C. J. It must be a question for the jury whether the alteration is or is not a mere exercise of the right of easement.]

Cur. adv. vult.

Lord CAMPBELL C. J., in this vacation (February 10th), delivered the judgment of the Court.

We are of opinion that this action is not maintainable. But we do not proceed upon the ground that the plaintiff, by the alteration in his windows, had entirely lost the right which he had before enjoyed, of having light and air through such portions of the present windows as formed portions of the ancient windows before the alteration; and we must be understood as not meaning to overturn any of the cases on which the plaintiff's

(*a*) 1 Camp. 320.

(*b*) 4 Esp. N. P. C. 69.

(*c*) 4 New. Ca. 381. See *Carr v. Foster*, 3 Q. B. 581.

(*d*) 4 A. & E. 176. 191.

Queen's Bench.
1852.
RENSHAW
v.
BRAN.

Volume XVIII. counsel has relied. But the plaintiff has acquired
1852.

RENSHAW

v.

BEAN.

nothing more in addition to that former right; and, if, by the alterations which he has made, he has exceeded the limits of that right, and has put himself into such a position that the excess cannot be obstructed by the defendant in the exercise of his lawful rights on his own land without at the same time obstructing the former right of the plaintiff, he has only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had, at all events until he shall, by himself doing away with the excess and restoring his windows to their former state, throw upon the defendant the necessity of so arranging his buildings as not to interfere with the admitted right.

The material facts proved appear to be, that the plaintiff and defendant have houses on opposite sides of the same court, which is the private property, and in the exclusive occupation, of the plaintiff; that the plaintiff, about eighteen or nineteen years ago, rebuilt his house, the outward wall being on the old foundation; that he raised it a story higher, putting windows into the new story, and altering the dimensions of all the windows in the lower stories, although they still embraced portions of the space occupied by the old windows; that the defendant, in the year 1850, rebuilt his house, and raised it a story, to about the same elevation as the plaintiff's; that thereby he obstructed the new windows in the upper story of the plaintiff's house; that without building a wall similar to the wall of the defendant's new house the defendant could not have prevented the plaintiff from enjoying the free use of the new windows in the upper story of the plaintiff's new house; and that this wall so raised to its present height darkened and

obstructed all the windows in the lower stories of the plaintiff's house.

Queen's Bench.
1852.

RENSHAW
v.
BEAN.

The defendant clearly had the same right to raise his house in 1850 as he would have had immediately after the plaintiff's house was raised, although he would have had no such right after the plaintiff's new windows in his new story had enjoyed the free access of light and air for twenty years. Would not the defendant have been justified, upon the raising of the plaintiff's house, in raising a wall on his own foundations to obstruct these new windows? Confessedly the defendant could not have maintained any action for placing the windows there, whereby his house was overlooked and his privacy was encroached upon; and, after an uninterrupted enjoyment of twenty years, the plaintiff would have had the same easement for these new windows as he had for the old, upon the supposition (it is said) that after such an enjoyment the law would presume a grant from the defendant. But there seems to be no doubt that the defendant, if he did not commit any trespass, was at liberty to interrupt the enjoyment so as to rebut such a presumption. This appears to have been all that the defendant did in the year 1850; and this is the alleged grievance for which the present action is brought. Consequently, the windows in the lower stories of the plaintiff's house are darkened, but the primary cause of this misfortune is the plaintiff's own act in raising his house and opening new windows in it, which had acquired no privilege. Can he thus complain of the natural consequence of his own act? We by no means say that, where the owner of a house alters the dimensions of an ancient window in it, he may in no case maintain an action for that which is an obstruction to the window

Volume XVIII. in its new state and would have been an obstruction
1852. to it in its former state. This would be contrary to a

RENSHAW
v.
BEAN.

long series of decisions beginning with *Luttrell's Case* (*a*) reported by Lord Coke. If the wall in which the window is be on the extremity of the owner's land, and the window is enlarged at the lower part of it, the owner of the adjoining land could easily obstruct the unprivileged part of the window, and would not be justified in building a wall which would obstruct the whole. But there was no mode of merely obstructing the new and unprivileged windows, and the unprivileged portions of the windows in the lower stories, in this case; and the obstruction of the privileged portions of these windows is a necessary consequence of the obstruction of the unprivileged portions of them and of the new windows in the additional story.

It has been suggested that this defence is not open to the defendant either under the plea of Not guilty or on the plea traversing the alleged right; and that, supposing it to be a good defence, the defendant ought to have confessed and avoided, admitting the obstruction, and excusing or justifying it by reason of the new windows opened by the plaintiff.

The case of *Frankum v. The Earl of Falmouth* (*b*) established this, that the plea of Not Guilty, under the New rules, puts in issue only the fact alleged to have been *wrongfully* done, and not the wrongfulness of that fact; and, though the contention there was that the plea did deny the wrongfulness of the fact complained of, and so incidentally denied the right asserted by the plaintiff, which is not the precise contention made in the present case, yet we are of opinion that the New Rules, and that case, in effect shew that the plea of Not Guilty denies only

(*a*) 4 Rep. 86 a.

(*b*) 2 A. & E. 452.

the fact complained of, and not its nature: and, as, in *Queen's Bench.*
this case, the obstruction was clearly proved to the
existing windows, the issue of Not Guilty must be found
for the plaintiff. 1852.

RENSHAW
v.
BEAN.

As to the plea traversing the plaintiff's alleged right, we have considered much whether the defendant ought not to have pleaded specially that, though some right did exist, yet the plaintiff had committed a great excess in the exercise of that right; and that it was impossible to obstruct the excess without at the same time obstructing the admitted right. But we are of opinion that such plea would after all be no more than an argumentative denial of the alleged right: for, as we have already observed in the outset, the plaintiff has, by his own acts of excess, at all events suspended and lost for the time his former right, if he has not actually and wholly destroyed it.

In holding that the action is not maintainable, we are glad to think that the decision is not likely to lead to any practical injustice or hardship, as it only gives the means of preventing a usurpation ripening into a right; and, when one of two neighbours occupying houses near each other raises his house a story, empowers the other to do the same at any time within twenty years.

We direct the verdict to stand for the plaintiff on the plea of Not Guilty, and to be entered for the defendant on the plea denying the right.

Judgment accordingly.

CRAKE *against* POWELL.

Tuesday,
February 10th.

Reported, 2 *E. & B.* 210.

Volume XVIII.
1852.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

Tuesday,
February 14th. SMITH and others, assignees of SHORE and others, bankrupts, against THORNE and another, executors of THOMAS TURNER, deceased.

*T. owed to
P. & Co.,
before their
bankruptcy,
275*l.* as surviving
partner of
T. Y. & Y., and
6565*l.* due in-
dependently of
that partner-
ship. As
part security
for the latter
debt he had
given P. & Co.
a mortgage for
5000*l.* Plain-
tiff, the official
assignee of
P. & Co., wrote*

*to T. : "By the books of the bankrupts, there is a balance of 275*l.* standing against you ;" and requested immediate payment. T. replied : " You have no occasion to blame yourself respecting any claim on me from the estate of P. & Co. The matter has been arranged with the assignees here ; and at the last meeting it was arranged that I should pay 450*l.* on the 20th of May, 450*l.* on the 20th of August, 450*l.* on the 20th of November, and 450*l.* on the 20th of February, next ; after which I am in hopes that I shall be able to transfer the 5000*l.* mortgage, to enable me to clear off the whole that may be standing against me." It was admitted that the instalments of 450*l.* were to be paid in respect of the debt of 6565*l.* that the mortgage mentioned in the letter was the mortgage for 5000*l.* given as part security for that debt, that the 275*l.* mentioned by the official assignee was the debt due to P. & Co. from T. as surviving partner of T. Y. & Y., and that T. had paid off the 6565*l.* before the present action was brought against the defendants, his executors.*

*Held, on error and bill of exceptions, that the Judge was right in directing the jury that the two letters did not amount to a sufficient acknowledgment or promise to take the debt of 275*l.* out of the Statute of Limitations, 21 Jac. 1. c. 17. s. 3., the letters not containing any absolute acknowledgment of a debt, or unqualified promise to pay, but only expressing a hope that, on the transfer of the mortgage, T. might be able to clear off the whole that might be standing against him.*

of action in the declaration mentioned did not, nor did any or either of them, accrue to the said bankrupts, or to the plaintiffs as their assignees as aforesaid, respectively, within six years next before the commencement of this suit." Issue thereon.

*Queen's Bench
1852.*

SMITH
v.
THORNE.

On the trial, before Lord *Campbell C. J.*, at the *London* sittings after *Trinity Term, 1851*, it appeared that *Turner* had been in partnership with two other persons, *Yeomans* and *Yates*, under the name of *Turner, Yeomans & Yates*, up to 1835, when the partnership was dissolved; and that, at the time of the bankruptcy of *Parker, Shore & Co.*, in 1843, 275*l.* 18*s.* 11*d.* was due to them from *Turner* as the surviving partner. *Turner* had, before the bankruptcy, again entered into partnership with two other persons, under the name of *Turner & Co.*, and at the time of the bankruptcy was indebted to *Parker, Shore & Co.* in a further sum of 6565*l.* which was secured, up to the amount of 5000*l.* by a mortgage of certain property of *Turner*. After the bankruptcy of *Parker, Shore & Co.*, *Turner* admitted to one of the plaintiffs that he was indebted to the bankrupts in the two sums of 6565*l.* and 275*l.* 18*s.* 11*d.*, and arranged to pay off the former by instalments, and then to pay off the latter. In June 1844, *G. W. Freeman*, one of the plaintiffs and official assignee, wrote to *Turner* as follows:

"43, Mill Hill, Leeds, 25th Junr, 1844.

Re *Parker, Shore & Co.*

Gentlemen,

By the books of the above bankrupts, there is a balance of 275*l.* 18*s.* 11*d.*, with interest, standing against you ever since the 16th January, 1843, and I take considerable blame to myself for allowing this debt and interest to remain so long unsettled; and I am now so

Volume XVIII. situated that I must request you will not fail in calling
 1852. on Mr. *Freeman* senior on *Monday* next, at No. 53,
 SMITH *Queen Street, Sheffield*, between the hours of 12 and 4
 v.
 THORNE. o'clock, and pay the same; and in case of non-compliance
 I must forthwith have recourse to most stringent
 measures agreeable to the late Act of parliament to
 enforce the payment thereof.

I am, Gentlemen, yours &c.

G. W. Freeman, Official assignee.

To Mr. *Thomas Turner*, for *Turner, Yeomans & Yates.*"

On 26th *June*, 1844, *Turner* wrote and sent the
 following answer:

"*Sheffield, 26th June 1844.*

Mr. *G. W. Freeman*. Sir, •

In reply to yours of yesterday's date I beg to
 observe that you have no occasion to blame youself
 respecting any claim on me from the estate of *Parker,*
Shore & Co. The matter has been arranged at the
 different interviews or meetings with the assignees here;
 and at the last meeting I had with Mr. *Freeman Jun.*
 it was arranged that I should pay 450*l.* on the 20th
May, 450*l.* on the 20th *August*, 450*l.* on the 20th
November, and 450*l.* on the 20th *February* next; after
 which I am in hopes that I shall be able to transfer the
 5000*l.* mortgage, to enable me to clear off the whole
 that may be standing against me.

I am, Sir, yours very respectfully,

Thomas Turner."

It was admitted that the four sums of 450*l.* each were
 to be paid on account of the debt of 6565*L*, that the said
 mortgage was the mortgage before mentioned as having
 been given by way of security for such debt, that the sum
 of 275*l. 18s. 11d.*, mentioned in the letter of the official

assignee, was the debt due from *Turner* as surviving partner of the firm of *Turner, Yeomans & Yates*, and that *Turner* had paid off the other debt of 6565*l.* before the action was brought. The Lord Chief Justice directed the jury that the letters of the 25th and 26th *June* "were not" "a sufficient acknowledgment or promise to take the case out of the operation of the Statute of Limitations, or to support a cause of action within six years before the commencement of the action as to the said debt of 275*l.* 18*s.* 11*d.*," "the said letters not containing any absolute acknowledgment of a debt, or promise to pay, but only expressing a hope that on the transfer of the mortgage the said *Thomas Turner* might be able to clear off the whole that might be standing against the said *Thomas Turner*." The jury found a verdict for the defendants on the issue in question, the plaintiff's counsel having previously tendered a bill of exceptions to the ruling of the Lord Chief Justice, insisting "that the said letter of the 26th *June* was, under the circumstances, and taken in connection with the said letter of the 25th *June*, a sufficient acknowledgment to take the said case out of the operation of the Statute of Limitations, and to support a cause of action within six years before the commencement of the action, as to the said debt of 275*l.* 18*s.* 11*d.*"

Honyman, for the plaintiffs. The two letters, taken together, form a sufficient acknowledgment of the debt, within stat. 9 G. 4. c. 14. s. 1., to take it out of the operation of stat. 21 Jac. 1. c. 16. s. 3. The intention of stat. 9 G. 4. c. 14. s. 1. as to the particular legal effect of such an acknowledgment was much discussed at first ; but it is now established that it should be taken as afford-

Queen's Bench.
1852.
SMITH
v.
THORNE.

Volume XVIII. 1852. ing evidence of a new promise, just as, before the statute,

*SMITH
v.
THORNE.*

an acknowledgment not in writing was allowed as evidence to the same effect; *Hurst v. Parker* (*a*), *Tanner v. Smart* (*b*). The letters in question, therefore, though they may not contain an absolute and unconditional promise, were, taken together, sufficient evidence of a promise to allow of the jury finding a verdict for the plaintiffs. In *Eicke v. Nokes* (*c*) the mere entry of a debt at a bankrupt's examination was held to create a sufficient acknowledgment of the debt by the bankrupt to take it out of the Statute of Limitations. *Smith v. Poole* (*d*) is to the same effect. [Williams J. Stat. 9 G. 4. c. 14. does not alter the law as to the effect of an acknowledgment of a debt; it alters only the manner in which the acknowledgment must be proved.] That is so. But, wherever an acknowledgment has been held insufficient, it has been either because the acknowledgment was not in itself a sufficient admission, or because it was coupled with some expressions which rebutted the evidence of an unconditional promise to pay. Here there are no such expressions: there is an acknowledgment of the debt, followed by an expression of hope that it will be soon settled. There is not, as in *Tanner v. Smart* (*b*), a promise by the debtor to pay the debt when he is able; if that had been the form of expression, no doubt the ability to pay should have been proved, according to the decision in that case. But here there is nothing to raise a presumption of inability. [Parke B. Suppose he had said "I will pay after a long time." That would not be a sufficient acknowledgment.] That would certainly not support the averment in the

(*a*) 1 B. & Ald. 92.

(*c*) 1 Moo. & Rob. 359.

(*b*) 6 B. & C. 603.

(*d*) 12 Sim. 17.

Queen's Bench.
1852.

SMITH
v.
THORNE.

declaration of a promise to pay on request. But, if he had said "I fear I may not be able to pay for a long time," the acknowledgment would be sufficient; for a mere expression of fear, or, as in the present case, of hope, with respect to the time of payment, does not shew inability to pay at once. It was admitted at the trial that the debt for which the mortgage, which *Turner* proposes to transfer, was given as security had been paid off. But to hold that the acknowledgment must be consistent with an intention to pay immediately is contrary to the decision in *Eicke v. Nokes* (*a*). *Dabbs v. Humphries* (*b*) and *Bird v. Gammon* (*c*) are also in favour of the plaintiffs. [Parke B. The acknowledgment must be consistent with an intention to pay, either on request, or else (which practically comes to the same thing) at the end of a particular period which has elapsed, or on some condition which has been fulfilled.] If the transfer of the mortgage is to be regarded as a condition precedent to payment in the present case, it is a condition which has not been fulfilled. But the statement in the letter as to the transfer is nothing more than an expression of a hope for a particular mode of payment, added to an unqualified acknowledgment of the debt. [Williams J. Vice Chancellor *Wigram*, in *Philips v. Philips* (*d*), states very clearly how the law stands as to acknowledgments of this kind. He says: "It is not strictly accurate to say, that the effect of acknowledging a debt barred by the Statute of Limitations is to revive it for all purposes." "The new promise, and not the old debt, is the measure of the creditor's right." "If the debtor promises to pay the old debt when he is able, or by instalments, or in two years,

(*a*) 1 *Moo. & Rob.* 359.

(*b*) 10 *Bing.* 446.

(*c*) 3 *New. Ca.* 883.

(*d*) 3 *Hare*, 281. 299.

Volume XVIII. or out of a particular fund, the creditor can claim 1852. nothing more than the promise gives him."]

*SMITH
v.
THORNE.*

Dodson v. Mackey (*a*) is an authority to shew that the admission of the debt in the defendant's letter is a sufficient acknowledgment to create a promise of payment, and that the effect of such acknowledgment is not qualified by the subsequent statement of his expectations as regards the time and mode of payment. *Humphreys v. Jones* (*b*) and *Gardner v. M'Mahon* (*c*) are also in point. In *Barrett v. Birmingham* (*d*) a return of a judgment debt made by an insolvent in his schedule was held to be a sufficient acknowledgment of the debt to take it out of the operation of stat. 3 & 4 W. 4. c. 27. s. 40. [*Parke* B. In *Kennett v. Milbank* (*e*), which turned upon stat. 9 G. 4. c. 14., the mere recital of a debt in a deed of composition with creditors, the amount not being mentioned, was held to be no sufficient acknowledgment. In *Bird v. Gammon* (*f*), however, the Court held that I was right in considering the mention of the amount not material.] At any rate there was sufficient evidence here to allow of the jury finding that *Turner* had promised to pay the debt. [*Parke* B. That is not a question for the jury. The later cases have decided that the effect of the document set up as an acknowledgment is entirely a question for the Court, unless extrinsic evidence is necessary to qualify or explain it.]

Tomlinson, contrà. *Hart v. Prendergast* (*h*) is a strong authority to shew that the acknowledgment here

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|-----------------------------|--|------------------------------|---|
| (<i>a</i>) 8 A. & E. 225. | (<i>b</i>) 14 M. & W. 1. | | |
| (<i>c</i>) 3 Q. B. 561. | (<i>d</i>) 1 Flan. & K. (<i>Rolls, Ireland</i>) 556. | | |
| (<i>e</i>) 8 Bing. 38. | (<i>g</i>) 3 New Ca. 883. | | |
| (| | (<i>h</i>) 14 M. & W. 741. |) |

Queen's Bench.
1852.

SMITH
v.
THORNE.

amounts, at the most, only to a qualified promise to pay at a time which has not elapsed, and therefore does not support the promise, alleged in the declaration, to pay on request. [Parke B. We are all of opinion that the letters do not, by themselves, amount to a sufficient acknowledgment; but we are not at present agreed as to the validity of the reason given by the Lord Chief Justice for his ruling; namely, that they only express a hope that Turner may be able to pay off the whole debt. It may be questioned whether they do not, under all the circumstances, amount to a promise of some kind; but you are bound to support the ruling on the ground given by the Lord Chief Justice, and on that alone. You must satisfy us that they express nothing more than a hope of payment.] The ruling must be read with the bill of exceptions, which explains it. The bill states that the counsel for the plaintiffs required the Lord Chief Justice to direct that the letters were, "under the circumstances," a sufficient acknowledgment. That expression means only the circumstances which are set out in the bill. If counsel for the plaintiffs had, in the bill, set out and insisted upon other evidence tending to convert the mere expression of hope into an absolute promise to pay, the ground of the ruling might have been objected to; but, as the bill of exceptions now stands, the ground was correct. An acknowledgment, to be within the meaning of stat.
⁹ G. 4. c. 14., must be absolute and unqualified, either on the face of it, or by proof of the occurrence of the particular event, or the performance of the particular condition, by which it is qualified. Here no such proof was insisted upon in the bill of exceptions; and the ruling was therefore right.

Volume XVIII.
1852.

SMITH
v.
THORNE.

Honyman, in reply. The argument that the ruling of the Lord Chief Justice may be explained by the bill of exceptions cannot be supported. The question whether any, and what, evidence is to be mentioned in the bill of exceptions, in support of the objections there taken, depends upon the ruling itself. The Lord Chief Justice directed the jury that the letters expressed nothing more than a hope of payment; the plaintiffs' counsel, therefore, could not insist upon the effect of evidence which would be available only where there already existed a conditional promise. In *Hart v. Prendergast* (a) there was no promise at all; here there is a promise, followed by an expression of hope as to the time of payment, which does not at all qualify the effect of the absolute promise which precedes it.

PARKER B. We are all of opinion that the direction of the Lord Chief Justice was right, on the ground given by him. It is not, therefore, necessary to enquire whether, if we had differed as to the correctness of that ground, the ruling could have been supported. The Lord Chief Justice told the jury that the letters were not a sufficient acknowledgment or promise to take the debt out of the Statute of Limitations, or to support a cause of action for it within six years before the commencement of the action. This was expressly excepted to. The ground given by the Lord Chief Justice for his ruling was that the letters expressed "only a hope that on the transfer of the mortgage" *Turner* "might be able to clear off the whole that might be standing against" him. We need not now consider whether, if this construction of the letters were incorrect, and they had

(a) 14 M. & W. 741.

Queen's Bench.
1852.

SMITH
v.
THORNE.

amounted to a conditional promise, they might, if the effect of other evidence had been insisted on in the bill of exceptions, have been held to amount, under all the circumstances, to a sufficient acknowledgment within the meaning of stat. 9 G. 4. c. 14. There has been no question, since *Tanner v. Smart* (a), that an acknowledgment of a debt must, in order to take it out of the operation of the Statute of Limitations, be sufficient to support the promise laid in the declaration, namely, to pay on request. By stat. 9 G. 4. c. 14. that acknowledgment must now be in writing; but it must still support a promise to pay on request, either by shewing, on the face of it, an unconditional promise to pay, or by the collateral fact of the performance of the condition, or the occurrence of the event, by which the promise is qualified. No doubt a mere acknowledgment of the existence of the debt (as, for instance, an L. O. U.), if unaccompanied by any expressions which control its effect, is sufficient to support an unconditional promise to pay. But in the present case there is no such acknowledgment. In the letter of the 26th June, *Turner* speaks of certain claims against him on account, not mentioning the amount or specifying the items. Whether that letter related at all to the debt of 275*l.* 18*s.* 11*d.* was a question for the jury. Assuming that it did, the construction of the letter was for the judge; and the Lord Chief Justice was, we think, right in holding that it did not, even when coupled with the letter of the 25th June, amount to any distinct acknowledgment of the debt, or promise to pay it, but only to a hope that, at some future time, and by the transfer of the mortgage,

Volume XVIII. *Turner* might be able to clear off what might be standing against him. We all agree that this cannot, under any reasonable construction, be considered as a positive engagement to pay on the part of *Turner*, and that the direction of the Lord Chief Justice was right. The judgment, therefore, must be affirmed.

SMITH
v.
THORNE.

CRESSWELL, TALFOURD and WILLIAMS Js., and PLATT and MARTIN Bs., concurred.

Judgment affirmed.

The QUEEN *against* The GREAT WESTERN Railway Company.

(The GREAT WESTERN Railway Company *against* TILEHURST.)

Reported, 15 Q. B. 1085.

(Judgment, Tuesday, February 10th.)

Saturday,
February 21st.

The Master, Pilots and Seamen of the Town of NEWCASTLE UPON TYNE in the County of NEWCASTLE UPON TYNE *against* BRADLEY and POTTS.

Reported, 2 E. & B. 428, note (a).

Queen's Bench.
1852.

SHEPHERD *against* The Marquis of LONDONDERRY *Tuesday,*
February 3d.
and another.

R EPLEVIN, for cattle distrained upon a certain The Tithe
Commissioners
have no power,
under stat.
6 & 7 W. 4.
c. 71. ss. 45.,
50., to deter-
mine a suit
pending
between two
rival claimants
of tithes;
inasmuch as
the words
“touching the
right to any
tithes,” in sect.
45, refer only
to suits which
raise questions
as to the tithe-
ability of par-
ticular lands,
not to those
which bring
into question
the right of
particular par-
ties to tithes of
which the ex-
istence is ad-
mitted: And,
further,
because a suit
raising only a
question of
title between
two claimants
of tithes is not
a “difference”
“whereby the
making” of the
award by the
Commissioners
is “hindred,”
within the
meaning of
sect. 45.
close of the plaintiff, and detained &c.

Avoiry: that the said close, at the time when &c., was chargeable with the payment of a certain yearly rent charge, under the Tithe Commutation Acts: that a certain amount of the said rent charge had then been in arrear for more than twenty one days, and after ten days' notice &c.: and, because the defendant the Marquis of Londonderry was entitled to the said amount, the said defendant, and the other defendant as his bailiff, well acknowledge the said taking of the said cattle, &c., as a distress for the said amount of rent charge, &c.

Plea 1. That the said close was not chargeable with the Payment of the alleged yearly rent charge, in manner and form &c. Issue thereon.

Plea 2. That the said Marquis was not the person entitled to the said rent charge or to any part thereof, in manner and form &c.: Issue thereon.

The action was brought by direction of the Court of Chancery, for the purpose of determining the question of the Marquis of Londonderry's right to tithes in respect of certain land in the parish of St. Giles, Durham, of which he claimed to be the impropriate rector, and part of which had been inclosed under a private Act in 1816. In 1829 the Marquis had filed a bill in equity against the owners of certain burgage tenements in the said

Volume XVIII. parish, to whom the land inclosed had been allotted, for 1852.

SHEPHERD
v.
Marquis of
LONDON-
DERRY.

an account in respect of tithes due from them as such occupiers. The answers to the bill set forth that the Marquis was not entitled to the said tithes as inappropriate rector, inasmuch as the tithes arising from one portion of the said parish belonged to the curate, and those arising from the remaining portion had been granted away, more than 200 years ago, by the then owners of the inappropriate rectory, to the respective owners of the land within that portion, including the then proprietors of the said burgage tenements, and now belonged to the present proprietors: and that there had not been, at all events for many years, any glebe land belonging to the rectory of the said parish, or anything to constitute an inappropriate rectory.

While this suit was pending, the Assistant Tithe Commissioner, acting under the Tithe Commutation Act, 6 & 7 W. 4. c. 71., made his award, apportioning the amount of rent charge payable in respect of the lands in question. At the time of making the award, he had notice that the suit was pending, and was required to enter upon and determine the question raised by it; but he declined to do so.

On the trial of the present action, before *Williams J.*, at the *Durham Summer Assizes*, 1851, it was objected, on behalf of the plaintiff, that, under stat. 6 & 7 W. 4. c. 71. ss. 45., 50., the Commissioner was bound to determine the suit before making his award; and that the award was consequently invalid, and the close not legally chargeable with the rent charge. The jury found that the Marquis was the inappropriate rector of the parish; that the land in question was titheable; and that the defendant was entitled to the tithe arising from that land; and a verdict was found for the defendants, leave

being reserved to move to enter the verdict for the plaintiff. *Queen's Bench.*
1852.

Knowles, in last Michaelmas term, obtained a rule nisi accordingly.

SHEPHERD
v.
Marquis of
LONDON-
DERBY.

Watson (with whom was *Manisty*) now (a) shewed cause. The Commissioner had authority to make the award. Stat. 6 & 7 W. 4. c. 71. s. 45. enacts that, "if any suit shall be pending touching the right to any tithes, or if there shall be any question as to the existence of any modus or composition real, or prescriptive or customary payment, or any claim of exemption from or non-liability under any circumstances to the payment of any tithes in respect of any lands or any kind of produce, or touching the situation or boundary of any lands, or if any difference shall arise whereby the making of any such award by the Commissioners or Assistant Commissioner shall be hindered," it shall be lawful for them to appoint a time and place for determining the same, and their decision is to be "final and conclusive:" and sect. 50 enacts that, "as soon as all such suits and differences shall have been decided," the Commissioners shall frame the draft of their award, declaring the amount of rent charge. The plaintiff contends that, under these sections, the Commissioner had no power to make the award upon which the defendant relies, until the question of title raised by the suit pending in Chancery had been determined, and that such question must be determined by the Commissioner. But, first, the suit is not a suit "touching the right to any tithes." These words mean, not questions of right to tithes as between individuals, but

(a) The arguments were completed on this day; the judgments were delivered on the 9th February following.

Volume XVIII. questions as to the titheability of particular lands. The
 1852. suit in question is brought by the present defendant for
 an account; the parties against whom the suit is
 brought admit the titheability of the land in question;
 but they assert that the defendant is not, and that other
 persons are, the owners of the tithes. [Patteson J. The
 words "as to the existence of any modus" &c. seem to
 cover all questions of titheability: if so, the preceding
 words "touching the right to any tithes" must mean
 something else.] The latter part of the description only
 extends and explains the meaning of the former. Sect.
 9 of stat. 5 & 6 Vict. c. 54., which is in pari materia,
 gives the Commissioners power, "in all cases, whether the
 tithes of any parish have been commuted or not, where
 any question as to the liability of any lands to the render
 of tithes, or as to the existence of any modus" &c.
 (following the language of stat. 6 & 7 W. 4. c. 71. s. 45.),
 "shall have been heard and determined by the said
 Commissioners," "to make an award" "for the deter-
 mination of all questions of arrears of tithes claimed in
 any suit which may be pending in any court of equity
 for the purpose of trying, as to the same lands, such
 liability" &c. From this it is clear that the words
 "touching the right to any tithes," in stat. 6 & 7 W. 4.
 c. 71. s. 45., mean touching the liability of any lands to
 the render of tithes. [Coleridge J. According to your
 construction, the word "suit," in sect. 45, does not refer
 at all to a suit in equity.] A suit in equity in respect of
 tithes is, properly, always a suit for an account. The
 Court of Chancery cannot, strictly speaking, decide the
 question of title to tithes. It can only decree an account,
 when the title has been determined by another tribunal.
 [Wightman J. A suit for an account may often, practi-

SHEPHERD
 v.
 Marquis of
 LONDON-
 DERRY.

Queen's Bench.
1852.

SHEPHERD
v.
Marquis of
LONDON-
DERRY.

cally, raise a question of title. *Coleridge J.* The use of the word "suit," in sect. 45, seems as if intended to cover something more than the mere questions of titheability which are enumerated afterwards.] Its meaning is explained by stat. 5 & 6 Vict. c. 54. s. 9. [*Wightman J.* Where the Commissioner, under sect. 27 of the former Act, confirms a parochial agreement made under sect. 21, which sets out "in what right" each "tithe owner is entitled to" the tithes, is he not, in fact, determining a question of title?] *Regina v. Tithe Commissioners (a)* decides that he is not. "Tithe owner," in sect. 21, means, as sect. 12 shews, merely the person "in actual possession" of the tithes; and therefore the confirmation of the parochial agreement would not necessarily determine a question of title between two rival claimants.

Next, the suit in question is not a suit "whereby the making of the award is hindered;" and it must have that effect, in order to come within the provisions of sect. 45; *Girdlestone v. Stanley (b)*. The purpose of the award is to determine the amount of rent charge; and that question is not affected by the question to whom rent charge is payable; *Regina v. Tithe Commissioners (a)*.

Moreover, the decision of the Commissioners is, by sect. 45, to be "final and conclusive on all persons." But their decision upon a question of title to tithes between two rival claimants could not be conclusive; for, by sect. 71, "any person having any interest in or claim to any tithes, or to any charge or incumbrance upon any tithes," before the passing of the Act, is to have "the same right to or claim upon the rent charge for which the same shall be commuted," as he had to or upon the

(a) 15 Q. B. 620.

(b) 3 P. & C. 421.

Volume XVIII. tithes, and "the like remedies for recovering the said
 1852. as if his right or claim" "had accrued after the commu-
 nication." It is clear, therefore, that any question to
 the title of tithes could be tried before the ordinary tribun-
 al after the award was made.

SHEPHERD
 v.
 Marquis of
 LONDON-
 DERRY.

Lastly, the award in the present case has been dis-
 confirmed, and is, therefore, by sects. 52, 66, "bindi-
 ng on all persons interested in the said lands or tithes," so
 that it cannot now "be impeached" "by reason of any mistake
 or informality therein or in any proceeding relating
 thereto."

(*Manisty* was stopped by the Court.)

Knowles, Atherton and T. Jones, contra. The suit
 question does, practically, involve a question of tit-
 ies. The defendants there deny the right of
 plaintiff to tithes, on the ground that the land in ques-
 tion had, before inclosure, been separated from the improp-
 erty; that is, on the ground that there is no tithe
 arising to him out of that land. [Coleridge J. No;
 the ground that the tithe arising from that land belongs
 to some one else.] The answers to the bill raise
 the question whether tithe arises to any one out of the
 land; for the defendants state that for many years
 tithe has been paid, and that it cannot be shewn that
 it ever has been paid. It has been urged that this is
 not one "whereby the making" of the award
 "hindered." But those words refer only to the words
 "any difference," which immediately precede them, and
 not to the various questions and claims before enumerat-
 ed, of which the suit "touching the right to any tithes" is
 one. *Re Crosby Tithes* (a) is an authority to shew that

(a) 13 Q. B. 761.

Queen's Bench.
1852.

SHEPHERD
v.
Marquis of
LONDON-
DERBY.

the Commissioner has power to determine a suit of this *nature*; and that it comes within the description, in *sect. 45*, of a suit "touching the right to any tithes." [Patteson J. In that case the question raised by the suit was whether tithe was payable at all.] It can hardly be said that that was the only question raised: the suit also involved the question whether, if tithe was payable at all, it was payable to the vicar or to the rector. [Patteson J. You are, in fact, contending that *Regina v. Tithe Commissioners* (a) ought to be overruled.] In that case there was no "suit" "pending;" and the judgment proceeded expressly upon the ground that the question was not "a difference" "whereby the making of the award was "hindered." *Wetherell v. Weighill* (b) also decides that the Commissioners have power to determine a suit of this kind, although such power is discretionary. [Wightman J. If you contend that a suit pending between two rival claimants of tithes is a suit "touching the right to any tithes," within the meaning of *sect. 45*, how do you explain the language of *sect. 71*?] That section applies only to questions connected with the right to tithes in which there has been no suit brought, and no decision by the Commissioner. The language of *sect. 45* is too plain to be controlled by mere inference from the language of other sections. (They also referred to stat. 2 & 3 Ed. 6. c. 13. s. 5., 6.)

PATTESON J. The defendant in this action, who is the inappropriate rector of the parish of *St. Giles, Durham*, disclaimed upon the close of the plaintiff, one of the

Volume XVIII. parishioners, for arrears of rent charge due from him
1852.

SHEPHERD

v.

Marquis of
LONDON.
DERRY.

according to the apportionment made by the assistant Commissioner under the Tithe Commutation Act, 6 & 7 W. 4. c. 71. Certain lands in the parish had been enclosed and allotted in 1816: and, at the time when the award of the Commissioner was made, a suit in Chancery was pending, instituted by the present defendant against the owners of certain burgage tenements, including the plaintiff, for an account of tithes due from them, as such owners, to the defendant, in respect of the land allotted to them. Notice of the suit was given to the Commissioner; but he made no enquiry as to the title of the present defendant, although he practically decided that the land was not exempt from tithes. It appears, by the proceedings in equity, that there were some burgage tenements in the parish which were exempt, according to the defendants in the suit, from payment of tithes, the former inappropriate rector having conveyed away the tithes to the owners of those burgage tenements, who were therefore at the same time the owners of the tithes. The suit, therefore, raised a question of title between the inappropriate rector and the owners of those burgage tenements. It was contended that this was a "suit" "pending touching the right to any tithes," within the meaning of stat. 6 & 7 W. 4. c. 71. s. 45., and that therefore the Commissioner was bound to determine it before making his award. Now, if the words "touching the right to any tithes" mean "touching the title to any tithes as between rival claimants," the suit in question would be one which the Commissioner has the power to determine: but, if we couple them with the words which follow shortly after, "whereby the making" of the award "shall be hindered," it is

Queen's Bench.
1852.

SHEPHERD
v.
Marquis of
LONDON-
DERBY.

clear, as we decided in *Regina v. Tithe Commissioners* (a), that they cannot refer to a question of title of that kind, because such a question does not hinder the making of the award, which is merely for the purpose of determining the amount of the rent charge payable, and not the particular person to whom it is payable. It has been said that in the case of *Regina v. Tithe Commissioners* (a) there was not a suit pending, but only a "difference," to which alone the words "whereby the making" of the award "shall be hindered" apply. But I think that the words "whereby the making" of the award "shall be hindered" refer, not only to the words "any difference," but to all the questions and claims mentioned in the previous part of the section. It is, therefore, unnecessary for us to express an opinion as to whether the Commissioner has, in some cases, power to determine a Chancery suit: and we expressly guarded ourselves against expressing an opinion on this point in *Regina v. Tithe Commissioners* (a). It is clear that he has not power to do so unless the suit hinders the making of his award. This construction of sect. 45 is confirmed by sect. 71, which provides that any person shall have the same right to or claim upon the rent charge as he had upon the tithes before the statute passed, and the like remedies for recovering the same as if his right or claim had accrued after the commutation. The making of the award, therefore, would do no mischief to either party as regards questions of title to tithes, which, by sect. 71, can be litigated in the same manner after the award as they could have been before. None of the cases cited are exactly in point either way; but the principle

Volume XVIII. involved in all of them is against the plaintiff. The present question is simply one of title between two rival claimants of tithes, and therefore one which the Commissioner had no power to determine. For these reasons I am of opinion that this rule ought to be discharged.

1852.

SHEPHERD
v.
Marquis of
LONDON-
DERRY.

COLEBRIDGE J. I am of the same opinion. The question turns entirely upon the language of sect. 4. It has been contended that the words "touching the right to any tithes" refer to questions touching the right one of two rival claimants to tithes of which the existence is undisputed, and not to questions as to the right of any one at all to tithes out of the particular lands. It is almost an absurdity, however, to suppose that the statute would give the Commissioners the power to determine a suit of this limited character, and yet make no provision for their determining suits involving the general question of titheability. But, if it be held that the language of the section is meant to include both kinds of suits, then it is clear that the former kind is one which according to a recent decision of this Court, to which we still adhere, does not "hinder" "the making" of the award, and therefore is not one which the Commission has power to determine. If it were, moreover, the provisions of sect. 71 would be useless. Another argument is this. Sect. 45 is a very strong enactment, taking away from the ordinary tribunals a large number of questions and bringing them before Commissioners, who, however learned, are necessarily without that assistance which a properly constituted Court would have: a knowledge of the meaning of the section, therefore, ought not to be strained beyond its necessary and obvious intent. We should be doing so, if we included within

provisions suits which do not hinder the making of *Queen's Bench.*
the award. That it was not the intention of the statute
to include these is also clear from the language of the
whole section; for all the other questions there specified,
as within the power of the Commissioners to determine,
are questions which would hinder the making of the
award.

SHEPHERD
v.
Marquis of
LONDON-
DERRY.

WRIGHTMAN J. The question in the present case is,
whether the Tithe Commissioner could make a valid
award while this suit in equity was pending. That
depends upon whether it was a "suit" "pending touch-
ing the right to any tithes," within the meaning of stat.
6 & 7 W. 4. c. 71. s. 45. I confess that I was at first
struck with the effect of that section, taken together
with sects. 21, 50. Sect. 50 provides that the draft
award by the Commissioner "shall contain all the parti-
culars" "required to be inserted in any parochial agree-
ment" Sect. 21 enacts that every parochial agreement
shall distinguish "in what right every" "tithe owner is
entitled to" "tithes." If the question depended solely
upon these sections, I should have doubted whether, the
words "touching the right to any tithes" being so
general, the Commissioner could have made a valid
award before he had determined this suit. But, upon
examination, the suit turns out to be, not a suit touching
the right to any tithes, but a suit between two rival
claimants of tithes, the existence of the tithes not being
called in question. To hold that such a suit comes
within the meaning of sect. 45 would be to hold that
the provisions of sect. 71 are perfectly nugatory.
Under the latter section the rival parties might still try
their title to the rent charge, after the award had been

Volume XVIII. made; so that the decision of the Commissioner could not be, as sect. 45 declares that all his decisions upon the questions there enumerated shall be, "final and conclusive."

SHEPHERD
v.
Marquis of
LONDON-
DERBY.

ERLE J. concurred.

Rule discharged (a).

(a) Reported by *Francis Ellis, Esq.*

Saturday,
February 21st. The QUEEN, on the prosecution of the Marquis of BRISTOL and others, *against* The TITHE COMMISSIONERS for ENGLAND and WALES.

(Re HALE Tithes.)

Mandamus,
directed to the
Tithe Commis-
sioners, alleged
that they had

proceeded to effect a commutation of the tithes of the parish of *H.*; and that, during the proceedings, certain differences, whereby the making of their award was hindered, arose between landowners in the parish and the vicar, viz., whether certain old inclosed lands were exempt from the render of great tithes in kind, and of tithes of wool and lamb in kind, or, if not so exempt, whether they were subject only to the payment of 1*s.* per acre yearly, in lieu of the said tithes, to the improvisor; and whether certain new inclosed lands were wholly exempt from the render of great tithes in kind, and of tithes of wool and lamb in kind. The writ commanded the Commissioners to hear and determine the said differences.

Return: That at a former meeting of the Commissioners, for the purpose of awarding the amount of rent charge payable by a township of the said parish, the vicar claimed the tithes of lamb and wool, the improvisor rector protesting against such claim, and the landowners contending that by an agreement, confirmed by a decree in Chancery in 1699, all the tithes of the parish had been commuted. That at a subsequent meeting, the Commissioners having given notice that it would be held for the hearing and determining certain differences whereby the making of their award was alleged to be hindered, the vicar proposed that his title to the tithes of wool and lamb should be tried by a feigned issue, the Commissioners first awarding the amount of rent charge to be paid in lieu of them to the party entitled; that the landowners insisted that the tithes of lamb and wool had been extinguished by agreement and by decree in Chancery, and that a difference existed between the landowners, vicar and improvisor concerning the said tithes; and they called upon the Commissioners to determine the question. That it was then arranged that, if the parties would not consent to try as above, the landowners might apply for a mandamus to the Commissioners to try the question whether the said tithes belonged to the vicar or to the landowners as improvisors of the tithes of their respective lands. The return also stated that the said question, raised at the last mentioned meeting, was one of title. It then set out a bill in Chancery, filed in

W. 4. c. 71., to effect a commutation of the tithes of the parish of Great Hale, in the county of Lincoln, and that, during the said proceedings, divers differences arose whereby the making of their award according to the said Act was hindered, whereof they had notice; that is to say, a certain difference between the owners of certain lands in the said parish, called and known as the old inclosed lands, and the Rev. R. Bingham, then being vicar of the said parish; the said landowners claiming and insisting that the said old inclosed lands were wholly exempted from the render of all great tithes in kind, and of all tithes of wool and lamb in kind, or, if not so exempted, that they were subject only to the payment of 1s. per acre yearly, to wit, to the impro priator of the said parish, for and in lieu of the same tithes (a); and a certain other difference, between the owners of certain other lands in the said parish, called the new inclosed lands, and the said vicar; the last

*Queen's Bench.
1852.*

The QUEEN
v.
TITHE
COMMI SIONERS.

1812 by the then vicar against certain landowners, for subtraction of tithes, in which the question was raised whether the lands of the parish were ever liable to pay tithes of lamb and wool to the vicar; and also a decree in the said suit, in 1817 (by which it appeared that the defendants therein con tended that by an agree-

ment, confirmed by decree of Chancery in 1699, part of certain inclosed lands was allotted to the vicar in lieu of all tithes arising to him from the said lands (a), and by a further agreement, in 1707, the landowners agreed to pay the vicar 1½d. per acre in lieu of all small tithes throughout the parish), which decree of 1817 ordered the master to take account of the tithes of wool and lamb, as due to the vicar, dismissing his bill as to tithes of hay. The return then stated a bill in Chancery, filed in 1819, by the impropriate rectors against the vicar, claiming the tithes of wool and lamb, which bill was dismissed with costs. It then stated perception of the tithes by the vicar; and that the Commissioners, considering that the said decree established the right of the vicar to tithes of lamb and wool, declined to comply with a requisition of the landowners, calling on them to confirm the agreements of 1699 and 1707, under stat. 5 & 6 Vict. c. 54. s. 7., and refused to decide the question of title. That, in 1845, the said landowners obtained a mandamus to confirm the agreements and decide the differences pending, and that, on return made, and demurrer, judgment was given for the Commissioners. That the assistant Commissioner, in 1850, made his award, which, after a fortnight's notice to the landowners, to give them an opportunity of advancing any further claim, was confirmed; and which awarded that all titheable lands in the parish were subject to payment of all tithes in kind, that certain persons therein named were impropriators respectively of the great tithes in the parish, and that the vicar for the time being was in possession of the tithes of wool and lamb, and entitled to the residue of the tithes; and awarded certain rents charges, in lieu of tithes, to the impropriators, and to the vicar "or to the party lawfully entitled," in lieu of tithes of wool and lamb, and of the said residue of tithes.

Held, on demurrer to this return, that, upon the whole record, the question raised was purely a question of title between the impropriator and the vicar, and that no difference existed between the landowners and the vicar which hindered the making of the award and which the Commissioners were therefore bound to hear and determine.

Quare, whether the writ was not bad, as raising, on the face of it, a question of title.

(a) See p. 160, note (a).

Volume XVIII. mentioned landowners claiming &c. that the said new inclosed lands were wholly exempted or discharged from the render of all great tithes in kind, and tithes of wool and lamb in kind: which several claims the vicar then denied. The writ commanded the Commissioners to hear and determine the said differences.

**The QUEEN
v.
TITHE
COMMISSIONERS.**

The return alleged that, on 24th *March* 1843, the Tithe Commissioners issued a notice that, on 24th *April* next, they would proceed to ascertain and award the sum to be paid by way of rent charge instead of the tithes of the township of *Great Hale* in the parish of *Great Hale*. That the meeting was held on 24th *April*, before an assistant Commissioner, at which the agents for the several parties concerned attended; and that the agent of Sir *George Farrant*, the impropriate rector, then protested against the vicar's claim to the tithes of lamb and wool; and the agent for the landowners of the parish then contended that, under and by virtue of a decree of the Court of Chancery, dated 1699, all the tithes of the parish had been commuted; and the agent of the vicar then contended that the vicar was entitled to the tithes of lamb and wool. That the said meeting was adjourned; and that, on 22d *January* 1844, the Tithe Commissioners gave notice that, on 22d *February* then next, they would proceed to hear and determine certain differences which had arisen, "whereby the making an award for the commutation of the tithes of the said parish of *Great Hale* was alleged to be hindered and obstructed." That, on 22d *February*, the meeting was accordingly held before an assistant Tithe Commissioner, when counsel on behalf of the vicar proposed that the title of the vicar to the tithes of wool and lamb should be tried on a feigned issue, and that the Tithe Commissioners should award a rent charge in lieu of

great tithes to the landowners in the said parish, a rent charge in lieu of the tithes of wool and lamb to the party entitled thereto, and a rent charge in lieu of the other small tithes to the vicar; and counsel on behalf of the said landowners then claimed and insisted that the said tithes of wool and lamb were extinguished by virtue of a certain agreement and a decree of the Court of Chancery, and that a difference was then existing between the said landowners, vicar and impropriator, concerning the said tithes of lamb and wool; and the said counsel called upon the assistant Tithe Commissioner to determine whether or not the vicar was entitled to the said tithes of lamb and wool. That counsel for the vicar then claimed the same tithes as belonging to him. That it was agreed that the said parties should have time to consider whether they would not consent to try a feigned issue as to the title to the said tithes of lamb and wool, and that, if they did not so consent, the landowners should be at liberty to move the Court of Queen's Bench for a mandamus to compel the Tithe Commissioners to try the question, whether the said tithes belonged to the vicar, or to the landowners as proprietors of the tithes of their respective lands. And the return alleged that "the question raised at the said meeting concerning the said tithes of lamb and wool was a question of title."

The return proceeded to state that, in 1812, the present vicar filed a bill in Chancery against certain occupiers of land in the said parish for the subtraction of tithes (including lamb and wool), and that a question was raised by the said suit for the decision of that Court, whether the lands of the said parish were ever liable to the payment of tithes of lamb and wool in kind

Queen's Bench.
1852.

The QUEEN
v.
TITHE
COMMISSIONERS.

Volume XVIII.
1852.

The QUEEN
v.
TITHE
COMMISSIONERS.

to the vicar, and whether from time immemorial the said lands had not been wholly free from the payment thereof. That, on 14th *November* 1817, a decree of the Court of Chancery was made in the said suit (which decree was set out, and by which it appeared that the defendants contended that, by an agreement in 1697, confirmed by a decree in Chancery in 1699, between the then vicar and certain occupiers of lands in the said parish, a part of certain newly inclosed lands was allotted to the vicar in lieu of all tithes arising to him from the said inclosed lands (a); and, by a subsequent agreement in 1707, between the then vicar and land-owners, 1½d. per acre was agreed to be paid to the vicar by the said landowners in lieu of all small tithes throughout the parish); which decree of *November*, 1817, ordered, among other things, the Master to take an account of the tithes of lambs and wool as being due to the vicar, dismissing his bill as to tithes of hay, also claimed by him. That, after this decree, all the defendants in that suit, except one *William Dawson*, who was tenant to the inappropriate rector, paid the vicar five years' arrears of tithes so decreed to him.

The return then stated that in 1819 the then inappropriate rectors filed a bill in Chancery against the present vicar for the tithes of wool and lamb, setting up, among other things, the said decree of 1817; and that, on the 25th *January*, 1821, the bill was dismissed with costs. That, in 1821, the said *W. Dawson* preferred a petition to the Court of Chancery, to exhibit a supplemental bill

(a) The return in this case did not set out the further agreement, at the same time, by the landowners, to pay to the inappropriate rector 1s. per acre, yearly, in lieu of tithes arising to him from certain other old inclosed lands. See, however, the writ; also *Regina v. Tithe Commissioners*, 14 Q. B. 459. 461.

in the original suit in which the decree of 1817 was made, and to prove that the vicar was not entitled to tithes of lamb and wool, or any compensation or satisfaction for the same, which petition was ordered to be dismissed with costs; and an appeal against such order was also dismissed. That, after this last decree, the said *W. D.* paid all the arrears of tithes decreed to be paid by him, including the arrears of the tithes of lamb and wool. That, since 1817, all the tithe payers in the parish, except the said *W. D.*, had paid or compounded for the tithes of lamb and wool to the vicar; that the Tithe Commissioners, considering that the said decrees established the principle that the said tithes of lamb and wool were payable to the vicar in kind, and that neither the rector, nor any other person whatsoever, other than the vicar, had ever any title to the said tithes, sent, on 5th June 1845, an answer as follows to a requisition made to them by the agents of the landowners.

" Gentlemen. In answer to your requisition to the Tithe Commissioners for *England* and *Wales*, I am directed to inform you that their power to confirm agreements touching tithes made before the passing of the act 6 & 7 W. 4. c. 71. is confined to such agreements as are not of legal validity (*a*). The Tithe Commissioners are of opinion that, as between the landowners and the inappropriate rector of the parish, the agreements you refer to are valid, and therefore that it would be improper in the Tithe Commissioners to affect to give validity to what requires no confirmation on their part. So far as the vicarial rights are concerned, the Tithe Commissioners are, indeed, of opinion that the said

Queen's Bench.
1852.

The QUEEN
v.
TITHE
COMMISS-
SIONERS.

(a) See stat. 5 & 6 Vict. c. 54. s. 7.

Volume XVIII. agreements are not valid; but they do not therefore feel
1852.

The QUEEN
v.
TITHE
COMMI-
SSIONERS.

that they are bound to confirm them; and, after giving the subject their best consideration, they decline doing so. I am further to inform you that, looking at the perception of tithes by the vicar, and the rights which, under the 12th section of the Act for the Commutation of Tithes, such perception gives, considering also the decree made by the Court of Chancery in 1819, dismissing with costs the bill of the impropriator praying to be declared owner of the tithes of lamb and wool in the said parish, they think they are bound to act on the principle of that decree, and, adverting to the 44th section of the Tithe Act, and bowing to the dicta of several of the Judges of Her Majesty's Courts at *Westminster*, intimating that the Tithe Commissioners ought not to deal with questions of title, they have before them all the requisites for making an award, and decline making the previous decisions you require."

The return then alleged that, in 1845, an application was made to this Court by the said landowners for a writ of mandamus to compel the Tithe Commissioners to confirm the agreements, and to decide and determine the differences then alleged to be pending. The return then stated the issuing of the writ and the return to it, and the demurrer thereto, and judgment for the Commissioners (a). That, on 21st *February*, 1850, the assistant Tithe Commissioner made his final award concerning the commutation of the tithes in the said parish; after which the agents of the landowners had a fortnight's notice that the Tithe Commissioners were about to confirm the award; and, the landowners not having given any notice of their intention to raise the question now raise—

(a) See *Regina v. Tithe Commissioners*, 14 Q. B. 459.

the said Tithe Commissioners, considering "that the said disputes and differences were not such as should hinder or did hinder the making" their award, on 28th February 1850, duly confirmed the said award.

The award was then set out, which found that 5,841 acres, 2 roods and 23 perches in the parish were subject to payment of all manner of tithes in kind; and that Sir George Farrant and Thomas Farrant Esq. were impro priators of all great tithes arising upon the ancient inclosures of the township of Great Hale; and that Richard Godson, Esq., was impro priator of all great tithes arising upon the ancient inclosures of the township of Little Hale; and that the owners of all the rest of the lands in the parish were impro priators of all great tithes arising upon their respective lands; and that the vicar for the time being was in possession of the tithes of wool and lamb arising upon all the titheable lands of the parish, and was entitled to all the residue of the tithes of the parish: And it proceeded to award an annual rent charge of 10l. 6s. 4d. to Sir G. Farrant and T. Farrant; 3l. 13s. 8d. to Mr. Godson; 1,162l. to the several landowners of the parish in the proportions specified in the schedule, in lieu of the tithes to which these parties were respectively entitled; and 360l. "to the vicar for the time being, or to the party lawfully entitled to the same," instead of all the tithes of lamb and wool arising upon or in respect of all the titheable lands of the said parish; and 450l. instead of all the residue of the tithes in the said parish.

Demurrer, assigning several special grounds. Joinder.

The demurrer was argued in last Hilary term (a).

*Queen's Bench.
1852.*

*The QUEEN
v.
TITHE
COMMISSIONERS.*

(a) January 24th and 28th. Before Lord Campbell C. J., Patteson, Coleridge and Wightman Js.

Volume XVIII. Cowling, for the prosecutors. First, the writ is good.
1852.

The QUEEN
v.

TITHE
COMMI-
SSIONERS.

It will be contended that the difference which the mandamus calls upon the Commissioners to decide relates to a question of title, and therefore is not within the provisions of stat. 6 & 7 W. 4. c. 71. s. 45. But the question really is, not to whom the tithes in question are payable, but whether or not the lands are exempt from the payment of tithes, either altogether, or (with respect to the inclosed lands) by the substitution of a modus of one shilling per acre. It was necessary for the prosecutors, in alleging the existence of that modus, to state to whom it was payable, namely, the inappropriate rector: but that does not make the question, as is contended on the other side, one of title between the inappropriate rector and the vicar. The statement, moreover, is laid under a videlicet. [Coleridge J. That would not make it immaterial, if it were material without it. Lord Campbell C. J. You must shew that all the writ is good. As regards the old inclosed lands, the question was to whom the modus was payable, the inappropriate rector or the vicar. That must surely be a question of title.] In *University College v. Garton* (a) it was held that a feigned issue, to try whether certain lands in a parish were liable "to render to the vicar for the time being of the said parish any manner of tithes," did not raise a question of title between the vicar and other parties. [Lord Campbell C. J. There the only point in dispute was whether the land was liable to pay vicarial tithes at all: in the present case we know that it is in dispute to whom the tithes should be paid.] It does not so appear upon the writ; and the Court will not

look beyond that. In *Regina v. Tithe Commissioners* (*a*) Queen's Bench. 1852.
the writ expressly averred that the point in dispute was a question to which of the two, the rector or the vicar, the tithes were payable ; and the writ commanded the Commissioners to make their decision "as to the person entitled to the tithes."

The QUEEN
v.
TITHE
COMMI-
SSIONERS.

Next, the return is bad. None of the various proceedings which it sets out is such as to deprive the Commissioners of their power to decide the differences mentioned in the writ. The questions which were settled by the mandamus in 1845 are not the same as those referred to in the present writ. But, even if they did form part of the matters now in dispute, the Commissioners are not precluded from hearing and determining them. Sect. 44 of stat. 6 & 7 W. 4. c. 71. provides that, if, before the making of the award by the Commissioners, any question as to the existence of a modus or customary payment, or any question as to exemption from or non-liability to the payment of tithes, shall have been already decided by competent authority, the Commissioners shall act upon the principle of such decision in making their award: but that applies only to cases where, at the time of the making the award, the propriety of the decision is not called in question. Where it is disputed, the Commissioners are bound, under sect. 45, to hear and determine. And sect. 44, under any circumstances, can apply only to the precise point which has been decided, and to those persons who were bound by such previous decision; *Croughton v. Blake* (*b*): it is therefore no bar to the setting up of new grounds of

(a) 15 Q. B. 620.

(b) 12 M. & W. 205.

Volume XVIII. exemption, and still less so when those grounds are set up by new parties, as in the present case. The same arguments apply to the suit of 1812, and to the various proceedings which followed upon it. The decrees of 1817 and 1821 related, no doubt, to part of the questions now raised; but those decrees were not binding even on the parties to the bills, inasmuch as the ordinary had not been made a party; 2 *Eagle on Tithes*, 20; 398, *Gordon v. Simpkinson* (*a*). It will be contended that the prosecutors are bound by the award of the Commissioners which is set out in the return. But the Commissioners had notice that the present differences were pending; and they were bound by sect. 45 to hear and determine them before making their award. The award, therefore, is, at all events, void as regard those matters in difference. [Lord *Campbell* C. J. May not the Commissioners decide that the differences of which notice has been given to them are not such as to hinder the making of their award, and thereupon proceed to make their award at once? *Coleridge* J. The statute, in such cases, provides a mode of appeal, under sect. 46.] The Commissioners are, at all events, bound to have the matters in difference regularly brought before them, as provided by sect. 45, before they can decide whether or not they affect the award. Sect. 5 will be relied on, which makes every confirmed award of the Commissioners binding on all persons interested in the lands or tithes. But that is explained by sect. 6, which declares that no confirmed award shall be impeached by reason of any mistake or informality therein. The statute, therefore, cures only technical irregularities.

Morris v. Duke of Norfolk (a). [Lord Campbell C. J. According to your argument, an award of the Tithe Commissioners could be set aside at any time.] Except on the ground of mere informality in the proceedings. Moreover, the words in sect. 52 are "every such confirmed award;" that is, by sects. 45, 50, 51, every award confirmed after all differences which are within the jurisdiction of the Commissioners to determine have been decided by them. But, even if the award here were valid, the Commissioners have power, under stat. 2 & 3 Vict. c. 62. s. 8., to make a fresh award if the former be "unjust" through any "manifest error." [Patteson J. The writ, as it seems to me, clearly raises a question of title between the impropriator and the vicar; the award is not material to that; it awards, conditionally, 360*l* by way of rent charge in lieu of tithes to the vicar "or to the party lawfully entitled to the same;" but that award is subject to the question of the vicar's right to those tithes.]

*Queen's Bench.
1852.*

The QUEEN
v.
TITHE
COMMISSIONERS.

Bovill, contrà, was stopped by the Court.

[Lord CAMPBELL C. J. Our opinion is at present against the prosecutors: but we will take time to consider our judgment.]

Cur adv. rult.

COLERIDGE J. (b) now delivered the judgment of the Court.

The writ of mandamus in this case states that there were certain differences between certain landowners of

(a) 9 Sim. 472. 492, 3.

(b) The only Judges in Court were Coleridge and Crompton Js.

Volume XVIII. the parish of *Great Hale* and the vicar, viz., as to the
 1852. old inclosed lands, whether they were wholly exempt and
 The QUEEN discharged from the render of great tithes and tithes of
 v. wool and lamb, or, if not exempt, whether they were
 TITHE subject only to the payment of 1*s.* yearly, to wit to the
 COMMISSIONERS impropriator of the said parish, for and in lieu of great
 tithes and tithes of lamb and wool, and, as to new
 inclosed lands, whether they were wholly exempt from
 great tithes and tithes of wool and lamb. The writ then
 commands the Commissioners to appoint a time and
 place for hearing and determining the said differences
 so pending.

The return states a meeting before the Assistant Commissioner, on 24th *April* 1843, pursuant to notice, at which the vicar claimed tithes of wool and lamb, and the agent of the landowners contended that, by a decree of the Court of Chancery in 1699, all the tithes of the parish had been commuted: that the meeting was adjourned to ascertain whether the Tithe Commissioners would consent that all the evidence relating to the disputes and differences which had so arisen should be heard before an assistant Commissioner; that a further notice was given by the Commissioners, for 22d *February* 1844, to hear and determine certain differences whereby the making their award was alleged to be hindered. That such meeting was held before an assistant Commissioner, when the parties attended by counsel. The vicar proposed that a feigned issue should be tried as to the right to the tithes of lamb and wool, the Commissioner first awarding a rent charge in lieu of them to the party entitled; but the landowners insisted that those tithes were extinguished by an agreement and decree of the Court of Chancery, and that a difference was existing

between the landowners, vicar and impropriator, and required the Commissioner to decide it. That it was arranged that time should be given to the parties to consider whether they would consent to try a feigned issue as to the title to the tithes of lamb and wool, and that, if they did not, the landowners should be at liberty to apply to this Court for a mandamus to compel the Commissioners to try the question whether the said tithes of lamb and wool belonged to the vicar or to the landowners as impropriators of their respective lands, being a question of title. The return then states a bill in Chancery, filed by the vicar (the same person as is now vicar) in 1812, against certain landowners for subtraction of tithes, in which a question was raised whether the lands were ever liable to payment of tithes of lamb and wool to the vicar. It then states a decree of the Court of Chancery of the 14th November 1817, by which it appears that the defendants set up an agreement of 1699, confirmed by a decree of the Court, and a subsequent agreement of 16th September, 1707, as binding on the vicar, which he denied to be binding on him, and by which decree of November, 1817, the Court ordered the master to take account of the tithes of lamb and wool as due to the vicar, dismissing his bill as to the tithes of hay. The return then states a bill in Chancery, in the year 1819, by the impropriators against the vicar, for the tithes of wool and lamb, which bill was dismissed out of Court with costs. The return then states a petition preferred in 1821 to Vice Chancellor Sir J. Leach, by one of the occupiers in the parish, for leave to file a supplemental bill in the original suit in which the decree of 1817 was made, and to prove that the vicar was not entitled to tithes of lamb

Queen's Bench.
1852.

The QUEEN
v.
TITHE
COMMI-
SSIONERS.

Volume XVIII. and wool, which petition was dismissed with costs. It
1852. then states an appeal to the Lord Chancellor, which
The Queen
v.

TITLE
COMMI-
SIONERS.

The return then states the perception of tithes of lamb and wool by the vicar, and, further, that the Tithe Commissioners, considering that the decrees had established the right of the vicar, on the 5th of *June* 1845, in answer to a requisition from the agent of the land-owners, declined to confirm the invalid agreements of 1699 and 1707, or to decide the question of title. It then states the application to this Court, in 1845, for a writ of mandamus to compel them to confirm the agreements and to decide the existing differences, the issuing of the writ, and the return to it, and demurrer, and judgment for the Commissioners in *December* 1849, which is reported in *Regina v. Tithe Commissioners* (a). It then states that the Assistant Commissioner, on 21st *February*, 1850, made his final award, but the confirmation of it was delayed until the 28th *February* in the same year, which delay was in order to give the land-owners an opportunity to make any further claim before such confirmation; and notice was given to the agent of the landowners of their intention to confirm the award about to be made, a fortnight before the 28th *February*. The return then sets out the award, which finds all the titheable lands in the parish subject to tithes in kind, states who are the impro priators of the great tithes, and that the vicar is in *possession* of the tithes of lamb and wool, and entitled to the residue of the tithes. It then fixes a rent charge of 10*l.* 6*s.* 4*d.* to Sir *George Farrant* and *Thomas Farrant*, 3*l.* 13*s.* 2*d.* to Mr. *Godson*, 1162*l.* to

(a) 14 Q. B. 450.

*the several landowners, 360*l.* to the vicar for the time being or party entitled, in lieu of tithes of lamb and wool, and 450*l.* to the vicar for other tithes.*

*Queen's Bench.
1852.*

*The QUEEN
v.
TITHE
COMMI-
SSIONERS.*

To this return there is a special demurrer. From the writ of mandamus itself we gather that, when the vicar is claiming tithes of lamb and wool, the landowners say that their lands are exempt from these tithes by reason of the payment of 1*s.* per annum in lieu of them to the impropriator. Now this either means that the impropriator, and not the vicar, is the owner of these tithes, but is bound to receive 1*s.* per annum in lieu of them (and, if that be the meaning, it raises at once a question of title between the impropriator and the vicar, which is a difference that the Commissioners cannot determine, and so the writ is bad; *Regina v. Tithe Commissioners*(a)), or it means that the vicar is the owner of these tithes, but cannot receive them because 1*s.* per annum is paid to the impropriator in lieu of them; a startling proposition, which one would think could hardly be supported by any state of circumstances. When, however, we come to look at the statements in the return, we find that this 1*s.* per acre is not an immemorial payment or modus, but has its origin in the agreement in 1697. That agreement may be binding on the impropriator; but it is invalid as regards the vicar, which the decrees in Chancery abundantly shew; and so plainly is this the case, that the landowners endeavoured to persuade the Commissioners to confirm it, as being an invalid agreement under the 7th section of stat. 5 & 6 Vict. c. 54., and, failing so to persuade them, obtained a writ of mandamus to compel them, in which also they failed,

Volume XVIII. and do not now attempt to renew such compulsion; for
1852. this Court has already expressly decided, in *Regina v. Tithe Commissioners* (*a*), that the agreements are not such as the Commissioners were bound to confirm. If, then, the agreement be binding on the impropriator only, and not on the vicar, and the *1s.* in lieu of tithes of lamb and wool be payable only under the agreement, it is plain that it can only be a payment exempting the lands from render of those tithes on the supposition that the impropriator is the owner of them: the vicar, if he be owner of them, is manifestly entitled to them in kind. In other words, the question is, in this view of it, one of title.

Again, it appears, by the return, that the Commissioners declined to go into further discussion, because they found the vicar in possession of the tithes of lamb and wool, and considered themselves bound by the principle of the decrees in Chancery, according to the 44th section of stat. 6 & 7 W. 4. c. 71. The learned counsel for the landowners argued that they are not bound; and cited authorities which shew that, when a feigned issue is tried under the 45th section of the Act, the Judge and jury are not so bound: and that is perfectly true; but it shews only that the landowners ought to have adopted the course of trying a feigned issue, which, as appears by the return, was proposed by the vicar and declined by them; if, indeed, there was any question which could be tried in such an issue between those parties.

Looking at the whole of the pleadings in this case, namely, the writ and the return, it is manifest that no

difference existed between the vicar and the landowners by which the making the award was hindered, nor any which the Commissioners had power to hear and determine. The question is purely one of title between the impropriator and vicar, which may still be contested under the provisions of the 71st section of the Act, which gives all persons who have claims to the tithes the same rights of claiming the rent charge allotted in lieu of tithes.

We are, therefore, of opinion that, even if the writ be good, which we think very doubtful, the return is a sufficient answer to it, and that judgment must be given for the Commissioners.

*Queen's Bench.
1852.*

The QUEEN
v.
TITHE
COMMISSIONERS.

Judgment for defendants.

Ex parte RAMSHAY Esq.

SIR F. KELLY, in last term (*a*), moved for a rule Application was made to shew cause why an information in the nature of a quo warranto against a county court judge, or the relation of a person who had held the office immediately before him, and who had been removed for inability and misbehaviour by the Chancellor of the Duchy of Lancaster, under stat. 9 & 10 Vict. c. 95. s. 18.

It appeared that, on a memorial addressed to the Chancellor, charging the relator with general misbehaviour, and particularizing one instance more strongly, and praying for his dismissal, the Chancellor had held an inquiry, which was attended by the relator and his counsel, and had heard evidence on the charges, not on oath or affirmation, and, within a few days after the close of the inquiry, had dismissed the relator by an instrument finding inability and misbehaviour, but not specifying any particular instance. Affidavits denying the inability and misbehaviour in the cases adduced on the inquiry, and generally, were put in.

This Court refused the rule, it not appearing that the relator had not been fully heard, or that the charges, if true, did not shew inability and misbehaviour; and the decision of the Chancellor being therefore final. And the Court held it not necessary that, after the inquiry had closed, a fresh notice to the relator should have been given, to shew cause against his being dismissed.

(*a*) January 31st, 1852. Before Lord Campbell C.J., Patteson, Coleridge and Wightman J.s.

Volume XVIII. a quo warranto should not be filed against *Joseph Pollock*
 1852. Esq., for using the office of judge of the county court of
Lancashire held at *Liverpool*.

Ex parte
RAMSHAY.

He moved on the relation of *William Ramshay* Esq., barrister at law. Mr. *Ramshay* deposed: That in *April* 1850 he was appointed judge of the county court of *Lancashire* (helden at *Liverpool*,) by the Earl of *Carlisle*, then Chancellor of the Duchy of *Lancaster* (*a*); and that he had exercised the office until 24th *November* 1854, when *Joseph Pollock*, barrister at law, intruded himself into the office by virtue of some alleged appointment; and the said *J. Pollock* had since continued to perform it and assumed the character of such judge, and was attempting to appropriate the salary and exclude the relator from the office. Mr. *Ramshay* was advised and believed that he himself still of right filled the office. The affidavit then stated:

“That he, this deponent, has at all times, since his said appointment to the said office, in all respects conducted himself with propriety and proper ability in the said office, and without any inability or misbehaviour whatsoever: and that this deponent has not resigned the said office, or been guilty of any misbehaviour or inability in or with reference to or in respect of the said office of judge of the said court, or in his character of judge of the said court, or otherwise: and that he never became liable to be dismissed from his said office of judge of the said court in any way whatsoever, or for any cause whatsoever. Nevertheless this deponent says that the said Earl of *Carlisle* did, on the said 24th day of *November* 1851, by a document under his hand and

(*a*) See stat. 9 & 10 Vict. c. 95. s. 16.

seal," "illegally and improperly, and contrary to the statute in that behalf, as this deponent is advised and believes, affect and claim, and pretend, as Chancellor of the said Duchy, to remove this deponent from his said office of judge of the said court on account of some supposed and pretended inability and misbehaviour; which this deponent, on his oath aforesaid, says never existed." A copy of the instrument of dismissal was annexed to the affidavit. It was as follows.

*Queen's Bench.
1852.*

*Ex parte
RAMSHAY.*

"To all to whom these presents shall come: I, The Right Honourable *George William Frederick*, Earl of *Carlisle*, Chancellor of the Duchy of *Lancaster*, send greeting. Know ye, that, *William Ramshay* Esquire, barrister at law, now being judge of the county court of *Lancashire* holden at *Liverpool* in and for a district whereof the whole is in the Duchy of *Lancaster*, duly appointed, divers reports, representations and circumstances relating to the ability and behaviour of the said *W. Ramshay*, as such judge and in the said office, made it proper and necessary for me, being Chancellor as aforesaid, and by virtue of my said office, and under and by virtue of the statute passed" &c. (9 & 10 Vict. c. 95., "For the more easy recovery of small debts and demands in *England*"), "to inquire, examine into and ascertain the ability and behaviour of the said *W. R.*, as such judge, in his said office; and thereupon due notice was given to the said *W. R.* in that behalf; and afterwards, and in the presence and hearing of the said *W. R.* and of his counsel, I, the said *G. W. F.*, Earl of *Carlisle*, Chancellor as aforesaid, did accordingly make due inquiry and examine into the ability and behaviour of the said *W. R.*, as such judge, in his said office; and the said *W. R.*, having heard the several matters brought before me in that behalf in his presence as aforesaid,

Volume XVIII. did, by himself and his counsel, make and urge such defence and answer to the said several matters as he thought fit: Now I, the said *G. W. F.*, Earl of *Carlisle*,

1852.
*Ex parte
RAMSHAY.*

Chancellor as aforesaid, having duly weighed and deliberately considered the said several matters and premises aforesaid, do find, determine and adjudge that the said *W. R.* is unable duly and properly to execute his said office of judge of the aforesaid county court, and the duties thereof; And I do also find, determine and adjudge that the said *W. R.* has misbehaved himself in his said office of Judge, and in the duties thereof: And therefore, and for such several and respective causes and reasons, and under and by virtue of the said statute, I think fit to, and do hereby, remove and discharge the said *W. R.* from his said office of judge of the county court aforesaid: And I do hereby declare the said *W. R.* removed and discharged from his said office of judge of the county court aforesaid accordingly. In witness whereof I have hereunto set my hand and seal, this 24th day of November A.D. 1851.

" Witness *F. Dawes Danvers,* *Carlisle.*

" *Duchy of Lancaster Office, London.*"

Mr. Ramshay further deposed that the said document was delivered to him by a messenger, who at the same time delivered a sealed letter from the Earl of *Carlisle*; of which a copy (excepting a paragraph marked private, and not material to the present question) was annexed, and which was as follows.

November 24. 1851.

" Dear Sir, This letter will reach you together with the very painful intimation of the decision to which I have thought it my duty to come.

One thing I request you to believe, which is, that nothing I am about to observe is written with the in-

tention or wish to deprecate any proceeding on your part in consequence of that decision, which you might see fit to adopt. Still, in taking a step which I fear you can only regard as one of a most inimical character, I cannot, in justice to truth, refrain from recording my conviction that the person whom I am thus removing from the post where I had placed him has very many good and some great qualities; that he has conferred essential benefits on the community amidst which he prosecuted his labours, now abruptly terminated; and that, in addition to other more private and personal reasons, I feel on these grounds much additional sorrow to have been unable to resist the conclusion that he had not the degree of self-command to enable him properly to perform the duties of the judge of the county court of Liverpool.

You will have perceived that this is not an official communication; still less is it one to which I expect any reply: but you are welcome to make any use of its contents you may deem proper.

I am, dear Sir, Your faithful Servant,

Carlisle."

Mr. Ramshay further deposed that he, after receipt of those two documents, wrote to the Earl of Carlisle, requesting to be informed in respect of what particular act or acts, word or words, he had claimed to remove Mr. Ramshay; and that Mr. Ramshay received a letter from the Earl simply acknowledging the receipt of Mr. Ramshay's letter, and giving no information. The affidavit contained a statement as to circumstances preceding the delivery of the order of removal; and it set forth a copy of a memorial presented to the Earl on

Volume XVIII. 9th October 1851, signed by certain inhabitants of 1852. *Liverpool.* The memorial was as follows.

Ex parte RAMSHAY. “To The Right Honourable the Earl of *Carlisle*, Chancellor of the Duchy of *Lancaster*.

“The memorial of the undersigned inhabitants of the borough of *Liverpool*, in the county of *Lancaster*,

“Sheweth : That your memorialists have occasion, which they deeply deplore, to address your Lordship in the language of indignation and complaint at the conduct pursued by *William Ramshay*, Esquire, the judge of the *Liverpool* county court, since his acquittal (*a*) by your Lordship and the commencement of his sittings. That Mr. *Ramshay* has brooded over wrongs, erroneously supposed to have been committed against him by the public press of *Liverpool*, until he has come to view all their acts in which his name is in any way mixed up through a distorted and distempered medium ; and, as evidence of this unhappy temper, he has, on several occasions, declared his intention of making an example of persons who were supposed to be his accusers previous to the late investigation before your Lordship. Under the influence of this morbid state of mind, he has lately denounced a most innocent placard (accidentally placed upon a wooden paling near his court, and used by bill stickers for all their placards) as a libellous attack upon himself, and as a contempt of his court : and, in the assertion of his power (of which he entertains a very exalted opinion) to visit all acts which he chooses to consider contempts of his court in a summary manner, he has lately sent a person, stated to be an officer of his court, with verbal directions only to bring Mr. *Michael*

(*a*) See post, p. 182.

James Whitty, the publisher of the placard above mentioned, to his court. The officer proceeded to Mr. *Whitty's* place of business, with a companion, to execute their verbal order. Mr. *Whitty* demanded their authority; and, on their stating they had none to produce, he refused to accompany them, but, at the same time, expressed his willingness to wait until they could procure either a warrant or summons from the court. This they refused to do; and, having recourse to force to compel him, they were resisted by Mr. *Whitty* and his son, and some of his servants; and they did not accomplish their object. The judge afterwards issued his summons, which was left at Mr. *Whitty's* dwelling house, requiring him to attend his court to answer for contempt. Mr. *Whitty* immediately obeyed the summons; when the judge not only went into the consideration of the questions of contempt of court with respect to the placard adverted to, but into charges of insulting and assaulting the officers of the court in discharging the verbal requisition that he (Mr. *Whitty*) should attend the court, and the resisting them in their attempting to take him to the court by force. And the judge ordered Mr. *Whitty* to pay a fine of 5*l*. for insulting the court, or to be imprisoned seven days at *Lancaster Castle*, and be imprisoned at *Lancaster Castle* absolutely for two terms of seven days for assaulting the officers, and to pay two other fines, of 5*l* each, for insulting the officers, or to be imprisoned fourteen days. The two penalties of seven days' imprisonment absolutely, for assaulting the officers, the judge afterwards withdrew, substituting the infliction of fines of 5*l* each, or seven days' imprisonment in each case in default of payment. The fines

Queen's Bench.
1852.

Ex parte
RAMSHAY.

Volume XVIII. were not paid; and Mr. Whitty was sent to *Lancaster* 1852.

Ex parte RAMSHAY. Castle. Two days after the hearing of the charges against Mr. M. J. Whitty, Mr. John Whitty attended on a summons for assaulting the officers; and, in result, he was fined in four penalties, of 40*s.* each, for assaulting and insulting the officers: in default of payment as to the assault the judge imposed an imprisonment in each case; and, as to the two penalties for insulting the officers, he stated that the amounts would be recoverable as debts under the County Courts Act; and, if not paid, that the defendant would be liable to two imprisonments of forty days each. Orders were drawn up to send Mr. John Whitty to *Lancaster*; when the inhabitants of *Liverpool* interposed and paid all the fines of Mr. John Whitty, to prevent his going to *Lancaster*, and paid the fines of Mr. M. J. Whitty, and procured his discharge from *Lancaster Castle*; when the following receipt was given to the contributors. ‘*Liverpool, 2 October, 1851.* Mr. J. R. Jeffrey has this day paid me, under protest, the sum of 33*l.*, on account of Mr. Michael James Whitty and Mr. John Whitty, viz., Mr. Michael James Whitty 5*l.* for wilfully insulting the judge in going to the court; 5*l.* for wilfully insulting Robert Hartley, an officer of the court, whilst going to the court; 5*l.* for wilfully insulting Roger Charnley, an officer of the court, whilst going to the court; 5*l.* for assaulting Robert Hartley, an officer of the court, in the execution of his duty; and 5*l.* for assaulting Roger Charnley, an officer of the court, in the execution of his duty; and Mr. John Whitty 2*l.* for assaulting Robert Hartley, one of the officers of the court, in the execution of his duty; 2*l.* for assaulting Roger Charnley, one of the officers of the court, in the execution of his duty;

2*l* for wilfully insulting *Robert Hartley*, one of the officers of the court, in going to the court; and 2*l*. for wilfully insulting *Robert Charnley*, one of the officers of the court, in going to the court. *William Strathern, Clerk* of the County Court of *Lancaster* holden at *Liverpool*.

Queen's Bench.
1852.

*Ex parte
RAMSHAY.*

"That, throughout the proceedings, Mr. *Whitty* senior exhibited no contumacy: on the contrary, whilst at his own place of business, he expressed his readiness to obey the court if served with a written request, and accordingly did so, as soon as he was served with the summons: and, throughout the inquiry against him, which lasted about seven hours, he was patient, respectful and forbearing, never uttering even a single word, although very many observations fell from the judge greatly calculated to wound and exasperate him. That the judge of the county court, on the other hand, throughout the proceedings against Mr. *M. J. Whitty* and Mr. *John Whitty*, in his various characters of accuser, witness, judge and jury, was pre-eminently harsh, vindictive and oppressive. That the construction put by the judge of the county court on the clauses of the County Courts Act, in reference to cases of contempt, is, as your memorialists believe, unconstitutional and illegal: and, if it were otherwise, that his unprecedented assumption of authority, and the temper which he has displayed in attempting to enforce that authority, plainly demonstrate that he has not the moderation and equanimity which are essential to the character of a county court judge. At the same time, the violent and unexpected measures resorted to by Mr. *Ramshay*, for upholding what he calls the dignity of his court, have alienated the great majority of the trading community; so that this court must be a comparatively useless one so

Volume XVIII. long as Mr. *Ramshay* shall be suffered to preside there.
1852.

Ex parte RAMSHAY. Your memorialists, in conclusion, pray that your Lordship would be pleased to hold in *Liverpool*, or its immediate neighbourhood, a court of inquiry into the conduct of Mr. *Ramshay* since his acquittal by your Lordship from the former charges made against him, and his resumption of his sittings. And that, if the foregoing facts be established against him, as your memorialists confidently believe they can be, that your Lordship would be pleased to remove Mr. *Ramshay* from the office of judge of the county court of *Liverpool*, and to appoint another judge, of learning, temper and moderation, in his stead."

Mr. *Ramshay* deposed that a copy of this memorial was sent to him from the Duchy Office, with a letter from the clerk of the Duchy (which could not be found) inquiring whether Mr. *Ramshay* admitted or denied the charges. Mr. *Ramshay* wrote to the Earl of *Carlisle* at great length, presenting, as he deposed that he believed, a correct view of most of the material circumstances known to him connected with the charges; and referring to a former inquiry into his conduct, which had been held by the Earl of *Carlisle*, in the preceding *June*, some particulars as to which were stated in the present affidavit, and upon which, it appeared, the Earl of *Carlisle* had declined to remove him: and Mr. *Ramshay* now urged the Earl of *Carlisle* not to harrass him with another inquiry so soon after the former, and protested against the same. Mr. *Ramshay* afterwards received from the clerk of the Duchy a letter, a copy of which was annexed to the affidavit, and which was as follows.

"*Duchy of Lancaster Office,*" &c.,

Sir,

"October 23d, 1851.

I am directed by the Chancellor of the Duchy of

Lancaster to acknowledge the receipt of your letter of the 20th instant, and of your observations with reference to the late proceedings in the county court of *Liverpool*, on the subject of which his Lordship had received a memorial, of which a copy was forwarded to you by his desire on the 11th instant. His Lordship desires me to inform you that, after weighing all the circumstances, he has decided to hear evidence in support of and against the charges on *Wednesday*, the 5th *November* next, at 10 o'clock in the forenoon, at the Court House at *Preston*, in the County Palatine of *Lancaster*; notice of which will be given to the memorialists. I am to add that yourself and the parties complaining will have the opportunity of being there represented by counsel, if thought fit. I am, Sir," &c., "F. Dawes Danvers."

Queen's Bench.
1852.

Ex parte
RAMSHAY.

An inquiry was held at *Preston*, which was attended by Mr. *Ramshay*, personally and by counsel. No part of the evidence against Mr. *Ramshay* was given upon either oath or affirmation. Mr. *Ramshay* further deposed "that he has never, at any time, been called upon by the said Chancellor to shew cause why he should not be removed from his said office of judge of the county court of *Lancashire* holden at *Liverpool*; but that he was merely called upon to shew cause why an inquiry should not be held, and to state whether he admitted or denied the charges of misconduct alleged against him in the said memorial, and before the said inquiry was held at *Preston*. And that this deponent had no notice, before the said decision, or after the said inquiry, or after the said Chancellor had considered the said evidence, to shew cause why he should not be dismissed; and that he, this deponent, never was called upon by or on behalf of the said Chancellor, at any time, to shew cause why this deponent should not be dismissed from

Volume XVIII. his said office ; and that he, this deponent, has never
1852. been informed, at any time, that the said Chancellor

*Ex parte
RAMSHAY.*

was about to dismiss this deponent, except by the actual dismissal itself, which came upon this deponent entirely by surprise. And that, if this deponent had had notice, and the opportunity, to shew cause against the said dismissal before it was pronounced, he, this deponent, is advised and believes he could have shewn to the Chancellor valid reasons why he, this deponent, ought not to have been dismissed." "That this deponent protested to the said Chancellor, in the most emphatic manner, in a long letter addressed and forwarded by this deponent to the said Chancellor before the said inquiry at *Preston* was fixed by the said Chancellor and notified to this deponent, against the said inquiry at *Preston*, or any other, being held by the said Chancellor for the purpose of inquiring into the said supposed charges of misconduct in the said memorial ; and protested, in the strongest manner, that the said supposed charges were matters of law cognizable by the ordinary legal tribunals, and that the said Chancellor ought not, therefore, to assume to himself to call in question, or to presume to adjudicate upon, the said supposed charges of misconduct ; and then and there, in the said letter, stated to and warned the said Chancellor that neither this deponent nor the said memorialists would abide by the decision of the said Chancellor thereon, and that most certainly this deponent would not submit to be bound by the decision of the said Chancellor thereon ; and that they were not proper subjects for the consideration of the said Chancellor, but consisted simply of the judicial action and decisions of this deponent upon certain cases of contempt before this deponent as judge of the said court, and depended upon the construction

of the County Courts Act in a matter upon which there had been no distinct judicial decision of the superior Courts at *Westminster* upon the section in question of the County Courts Act. That, after and under this protestation, deponent attended at *Preston* solely from and out of respect to the said Chancellor, and under the impression that the said Chancellor had appealed to the honour of this deponent to shew the entire propriety of his own conduct, and to remove some false impressions in the public mind, and thus place this deponent and his patron the said Chancellor in a proper position in the eyes of the world; and that, by so attending under protest, deponent did not intend in any way to waive his legal rights, and stated, by his counsel in court at *Preston*, before the commencement of the said inquiry, that actions were brought or intended to be brought against deponent for his conduct relative to the matters in question, and that he might be prejudiced therein by the said inquiry and by the delay and distraction and expence incident thereto and otherwise."

*Queen's Bench.
1852.*

*Ex parte
RAMSHAY.*

The affidavit further entered into the merits of the matters discussed on the inquiry, which comprehended, besides the charge in respect of the conduct of Mr. *Ramshay* towards Messrs. *Whitty*, numerous other alleged instances of misbehaviour, in respect of temper and demeanour. The charges were denied and explained by the affidavits of Mr. *Ramshay* and many other deponents: and the affidavits also contained depositions in favour of Mr. *Ramshay*'s general conduct and abilities as a judge. Mr. *Ramshay* also deposed to circumstances from which he inferred that the charge against him had been made principally at the instance of a society at *Liverpool* called the *Guardian Society*: and his affida-

Volume XVIII. vit impugned the motives of the society and of other
 1852. persons who had taken a part in preferring the charges.

*Ex parte
RAMSHAY.*

Sir *F. Kelly*, in support of his motion. The affidavits shew that the dismissal was not warranted by the facts. [Lord *Campbell* C. J. We cannot enter into the merits: it was for the Chancellor of the Duchy to decide upon them.] The relator is entitled to the opinion of a jury on the question of "inability or misbehaviour," within the meaning of stat. 9 & 10 Vict. c. 95. s. 18. [Lord *Campbell* C. J. Do you say that Mr. *Ramshay* was not heard, or that the matters charged did not shew inability or misbehaviour?] The relator's case is that the charges were not supported by the evidence: and, as to this, the decision of the Chancellor is no more final than the decision of a rector upon the dismissal of a parish clerk. A clerk so dismissed is entitled to a mandamus to be restored. [Lord *Campbell* C. J. Is that so where the clerk has been heard?] The judgment of the rector is not final; *Rex v. Warren* (*a*). But, further, the language of sect. 18 shews that the fact of inability or of misbehaviour is necessary to give the Chancellor jurisdiction. The statute gives no power to the Chancellor to examine upon oath; nor has he any means of inquiry beyond those which a private individual would have. The proceeding, therefore, is not in the proper sense of the word judicial. Consequently, unless the remedy now asked for can be granted, the party dismissed has really no means of ensuring a legal inquiry at all. As the evidence was not, and could not be, given upon oath, the judgment of the Chancellor may be

(*a*) 1 *Comp.* 370.

grounded upon testimony the falsehood of which will not subject the witnesses to a prosecution for perjury. It is highly improbable that the Legislature should have intended such an inquiry to be final. This Court appears to have decided in favour of the principle for which the relator contends, in *Regina v. Owen* (*a*). There, under sect. 24 of the same statute, the judge of a county court dismissed the clerk of the court; and the dismissal was approved of by the Lord Chancellor. It was held that the dismissed clerk was entitled to question the validity of the dismissal by an inquiry in the nature of a quo warranto against his successor: and, issue being joined as to the fact of inability, and the jury having specially found only facts which, in the opinion of this Court, did not amount to inability, judgment was given for the Crown. The instrument of dismissal here does not specify the inability: it may have been no more than existed in *Regina v. Owen* (*a*). [Lord Campbell C. J. It there appeared that the only inability suggested was insolvency. Do your affidavits here shew that nothing was charged against the relator which could amount to inability or misbehaviour?] The question is, how the fact is to be determined. In *Regina v. Owen* (*b*) Erle J. said: "The county court judge has power to dismiss his clerk for inability; and the clerk, if he is dismissed on that ground, has a right to raise the question whether the fact of such inability exists; and, when that question is raised, it is for the jury to decide it." [Lord Campbell C. J. That was said after the information had issued, and the special verdict had been returned. It is probable that the affidavits on which the rule was granted shewed a charge amounting to what the jury found. Patteson J.

Queen's Bench.
1852.
Ex parte
RAMSHAY.

Volume XVIII. On the argument upon the rule for a quo warranto it was conceded that the sole ground was the insolvency. [Lord *Campbell* C. J. And without some such admission proof there could have been no rule.] The letter accompanying the delivery of the dismissal here shew that the Chancellor did not himself consider that strong case was made out.

Another ground for the application is that the cases adduced on the inquiry were very numerous and embarrassing. [Lord *Campbell* C. J. Does it appear that Mr. *Ramshay* applied for further time?] That is not so. But the main complaint was originally the fining of Mr. *Whitty*; while, at the hearing, numerous other complaints were adduced.

Further, at the close of the inquiry, the proper course would have been to call on Mr. *Ramshay* to shew cause why he should not be dismissed. *Ex parte Kinnaird* (shews that this step should have been taken after the determination on the facts. But it appears that the Chancellor executed the instrument of dismissal without any communication or notice to Mr. *Ramshay*, in a very few days after the inquiry.

Cur. adv. vnu.

Lord *CAMPBELL* C. J., in this vacation (*February* 10th) delivered the judgment of the Court. After stating the nature of the application against Mr. *Pollock*, his Lordship said :

The ground of the application is that, when he was appointed to the office, it was not vacant, William *Ramshay* Esq., who before filled it, not having been lawfully removed from it. The question which was

(a) 4 Com. B. 507. See *Bonaker v. Evans*, 16 Q. B. 162.

have to consider therefore is, whether, upon the affidavits laid before us, Mr. *Ramshay* is entitled to question the legality of his removal in a quo warranto against his successor.

*Queen's Bench.
1852.*

*Ex parte
RAMSHAY.*

This depends upon the true construction of stat. 9 & 10 Vict. c. 95. s. 18., whereby it is enacted : "That it shall be lawful for the said Lord Chancellor, or, where the whole of the district is within the Duchy of *Lancaster*, for the Chancellor of the said Duchy, if he shall think fit, to remove for inability or misbehaviour any such judge already appointed or hereafter to be appointed."

By a formal instrument under the hand and seal of *George William Frederick, Earl of Carlisle*, Chancellor of the Duchy of *Lancaster*, within which the whole of the district of this county court lies, Mr. *Ramshay*, before the appointment of Mr. *Pollock*, was removed for inability and misbehaviour.

We are of opinion that this instrument is not absolutely conclusive ; that the Chancellor, in the exercise of the authority to dismiss from the office, is, in the language of the Judges in *Rex v. Warren* (*a*), "subject to the controul of this Court," and that (as is there said) we may inquire into the cause and manner of amotion. We cannot insist that the instrument of removal shall set out all the proceedings instituted in order to the removal, with the specific charges shewing inability or misbehaviour, or the evidence adduced to support these charges. The instrument being drawn up in the words of the Act of parliament, we may presume that the Chancellor has duly exercised his jurisdiction till the contrary is proved. But we think that it would have been open to Mr. *Ramshay* to shew that he was removed

Volume XVIII. without notice of any charges against him, or without an opportunity of being heard in his defence, or that no evidence was adduced to support the charges, or that the complaints against him were not for inability or misbehaviour in his office, and were of such a nature that, if proved or admitted, they could not disqualify him for his office, or amount to *inability* or *misbehaviour*, within the meaning of the Act of parliament. Upon such affidavits, we think that we should have been bound to grant a rule to shew cause for a quo warranto, with a view to his being afterwards restored to his office from which he had been illegally removed. We are to see that judges and functionaries vested with judicial authority do not exceed their jurisdiction. The Chancellor has authority to remove a judge of a county court only on the implied condition prescribed by the principles of eternal justice, that he hears the party accused: he cannot legally act upon such an occasion without some evidence being adduced to support the charges; and he has no authority to remove for matters unconnected with inability or misbehaviour in the office of county court judge. Where the party complained against has had a fair opportunity of being heard, where the charges, if true, amount to inability or misbehaviour, and where evidence has been given in support of them, we think we cannot inquire into the amount of evidence or the balance of evidence, the Chancellor, acting within his jurisdiction, being the constituted judge upon this subject.

Looking to the affidavits on which this motion was made, they appear to us to be insufficient to rebut the presumption that the removal was regular and rightful. The affidavits very strongly assert Mr. *Ramshay's* uniform good conduct as a judge, as well as his ability;

*Ex parte
RAMSHAY.*

Queen's Bench.
1852.

*Ex parte
RAMSHAY.*

and they particularly seek to justify his conduct on some occasions when he was supposed to have acted improperly, as in fining the editor of a newspaper for a contempt of court. But Mr. *Ramshay* does not say that grave charges of misbehaviour as a judge were not brought against him, or that he had no notice of these charges, or that he had not a fair opportunity of being heard upon them, or that evidence was not adduced to support them. Consistently with these affidavits, the proceedings may have been regularly conducted; and there may have been evidence before Lord *Carlisle* sufficient to support the charges and to warrant the judgment.

Sir *Fitzroy Kelly* contended that, upon the just construction of the statute, this Court is bound to grant a quo warranto so that the merits of the case may be ultimately determined by a jury. But we are of opinion that, when the Chancellor has duly acted within his jurisdiction in the exercise of this authority, giving notice to the party accused of the charges against him, those charges, if true, amounting to inability or misbehaviour in his office, inquiring by evidence into the truth of the charges, and hearing the party accused, the Legislature intended that the Chancellor's sentence of removal should be final and conclusive.

Much stress has been laid upon the hardship which, from this construction of the statute, would arise to county court judges, who certainly fill an office of great dignity and importance in the administration of justice. But such a topic can only be legitimately used to assist us in getting at the real meaning of the Legislature: when that is ascertained, we are not at liberty to be governed by any opinion which we may entertain as to the policy or even the justice of the enactment.

Volume XVIII.
1852.

Ex parte
RAMSHAY.

But it may not be very improbable that the Legislature, amidst a choice of difficulties, intended to confer this power of removal, without an appeal to a jury, upon the Lord Chancellor or the Chancellor of the Duchy of *Lancaster*. These are high functionaries under the Crown, and directly responsible to Parliament for the due exercise of the authority committed to them. There must be a power lodged somewhere of removing county court judges, both for inability and misbehaviour. Practically, this power could hardly be exercised by the Crown on the address of the two Houses of Parliament, according to the course prescribed for the removal of the Judges of the superior Courts in *Westminster Hall*. Is the appeal to a jury, which it is supposed that the Legislature must have contemplated, altogether free from inconvenience? With all due deference for juries in the exercise of their proper functions, the Legislature may have thought that the Lord High Chancellor of *Great Britain* or the Chancellor of the Duchy of *Lancaster* is likely to form quite as impartial and enlightened an opinion, after hearing evidence on the subject, as to the ability and behaviour of a judge in his office.

Nor can we overlook the obstruction which would arise to the administration of justice in the country from the doctrine contended for. If, upon a removal after an inquiry duly conducted, the appointment of a successor may be questioned in a quo warranto, then, in every case in which affidavits can be obtained denying the charges and falsifying the evidence by which they were supported, a quo warranto may go; unseemly struggles may arise between the two claimants to the office in the discharge of its duties; and questions may be made whether all the proceedings in the court for many months are not *coram non judice*.

But, after all, we must look to the language which the Legislature has employed, and put upon it its natural and grammatical meaning, nothing appearing to shew that it is used in any extraordinary sense. "It shall be lawful for the said Lord Chancellor," "if he shall think fit, to remove for inability or misbehaviour any such judge." Is not the natural and grammatical meaning of his language that, if the Chancellor proceeds duly, he may without appeal remove for inability or misbehaviour, and that, having heard evidence, he is to determine whether the inability or misbehaviour is made out. He is clearly constituted judge of the inability or misbehaviour in the first instance; and, if no appeal is given expressly or impliedly, his judgment must be final. No appeal is expressly given; and to imply an appeal, we think, would be to legislate, not to construe the language of the Legislature.

*Queen's Bench.
1852.*

*Ex parte
RAMSHAY.*

Sir *Fitzroy Kelly* relied much on *Regina v. Owen* (a). But, when this case is examined, it will be found to be no authority in his favour. Although it proceeds on sect. 24 of the Act, respecting the removal of a clerk by a judge, it would have been strongly in point if the quo warranto had been there granted after the judge had objected to the clerk charges which, if true, proved inability or misconduct, and, after due inquiry, and giving the clerk an opportunity of being heard, had dismissed the clerk upon the ground that the charges were substantiated. But, on inquiring what took place when the quo warranto was granted, we find that it was made out to the Court that, instead of misbehaviour being imputed to the clerk, it was admitted that he had always performed the duties of his office unexception-

(a) 15 Q. B. 476.

Q. B. HILARY VACATION.

VIII. ably; and the only *inability* imputed was an inability to
pay all his debts, without any suggestion that this had
^{parte} affected his mind or in any degree disabled him from
doing the duties of clerk. Therefore there was no
imputation of inability or misbehaviour in his office
and, admitting the truth of all that was imputed, no
inability or misbehaviour in his office appeared. When
the special verdict was argued, no question arose as to
the right to the quo warranto; and the observations
the learned Judges then made must be taken with
reference to the facts and points then before the Court.

Sir *Fitzroy Kelly* likewise relied upon a class of cases respecting the removal of a parish clerk by the incumbent. But, supposing that the Chancellor here has only the same power of removing the county coroner as judge which the incumbent has of removing the clerk at common law, no case has been cited where, the incumbent having proceeded regularly against the parish clerk, bringing charges against him of misbehaviour in his office, giving him notice of these charges, and having, after hearing evidence to substantiate them and hearing his defence, dismissed the clerk on the ground that the charges were proved, this Court interfered to restore him by mandamus, on affidavits that he was innocent and that the evidence against him was false. The case of *Rex v. Warren*(a), which was mainly relied upon, not by any means to this effect. The report is short and unsatisfactory: but the rule to shew cause seems have been granted on the ground that the clerk was in prison when he was removed, so that he could not have been heard in his defence; that he had appointed a deputy; and that no misconduct in his office had been imputed to him. When cause was shewn,

(a) 1 *Coupl. 370.*

Court said : "There is no sufficient reason assigned in the affidavits that have been read, upon which the Court can exercise their judgment; nor is there any instance produced of any misbehaviour of consequence." Therefore, supposing that the clerk had been heard in this case, as in *Regina v. Owen* (a), no inability or misbehaviour in the office was imputed, and the incumbent had no authority to remove. Lord Mansfield there uses the expression, which we adopt: "he can never be the sole judge and remove him *ad libitum*; without being subject to the controul of this Court." The Court may inquire into the cause and manner of amotion. But, from the language of the Judges, and the course of the proceeding, there can be little doubt that, if the affidavits had shewn that acts of misconduct in his office were imputed to the clerk, that he had been heard upon them, and that the incumbent proceeded on the belief of evidence in support of the charges, the rule never would have been granted, however numerous or strong might have been the affidavits to shew that the clerk was innocent.

Queen's Bench.
1852.

*Ex parte
RAMSHAY.*

We are, therefore, of opinion that the construction of the Act of parliament contended for neither rests on principle nor on authority, and that, unless some defect is pointed out in the manner in which the proceedings were conducted in this case, we are not entitled to interfere.

Sir Fitzroy Kelly complained that, the charges having originated in a memorial of a society at Liverpool called the *Guardian Society* for misconduct in fining a person of the name of Whitty for a supposed insult to the judge, other charges not contained in the memorial were afterwards brought forward. But such an in-

(a) 15 Q. B. 476.

Volume XVIII. ^{1852.} *quiry is to be conducted according to the substantial rules of justice, not according to the technical rules of special pleading. It is conducted as an inquiry before the Benchers of an Inn of Court into charges upon which a barrister may be disbarred, and can be conducted in no other way, the Legislature not having prescribed any formalities, and not having conferred the power of administering an oath. It is not alleged by Mr. Ramshay that he was not fully heard on all the charges brought against him.*

Complaint is next made of the time which elapsed between the close of the inquiry and the sentence of removal, and that no further notice was given to Mr. *Ramshay* to shew cause why he should not be removed: but the fair inference from the affidavits is that the inquiry was known to all parties to be finally closed, and that the Chancellor of the Duchy only took time deliberately to consider the evidence, and to consider of his judgment.

Last of all, it is said that this solemn judgment under his hand and seal is vitiated by a private letter of the same date written by Lord *Carlisle* to Mr. *Ramshay*. But, although a general liberty is given to Mr. *Ramshay* to make what use of it he pleased, one can hardly think that this extended to the use of it in a Court of justice for the purpose of nullifying the dismissal. It was evidently written with a view of softening, as much as possible, the pain to be inflicted in the discharge of a public duty: and the sentiments there expressed are perfectly consistent with the tenor of the sentence of removal; for it is possible that a man may have valuable qualities and may be amiable in private life, and yet may be justly removed for inability and misbehaviour as a Judge.

Rule refused.

Queen's Bench.
1852.

Doe, on the demise of THOMAS HENRY EVERES and [*Friday,*
January 30th,
MARY ANN, his wife, *against* WILLIAM WARD 1852.]
and others.

EJCTMENT for two undivided third parts or shares
of freehold houses numbered 1 to 9 in *Angel Court*,
Great Street, in the parish of St. Giles without Cripplegate,
in the city of London; also for one freehold house in
Great Street aforesaid, the corner of *Phillips Court*, and
the whole of *Phillips Court* in the said parish, being the
freehold houses mentioned, among others, in the devise
to John Dolley, and in the codicil, hereinafter set forth.
Issue being joined, a special case was stated, by consent
and the order of a Judge, for the opinion of this Court.
The following facts appeared by the case.

Devise :
I give to my
son, J. D.,
during his
natural life,
nine freehold
houses, &c. ;
and, from and
after his
decease,
I give the
said houses
unto his
children &c.
(if sons, on
their attaining
the age of 23,
if daughters,
of 21), their
heirs &c., as
tenants in

common; and, in case he has only one child, to such one child (on attaining age, as before),
his or her heirs, &c. And, in case all the children of my said son shall die under the age,
&c. (as before), then I give the before mentioned premises to my daughters, S., A. and
E. M., during their respective natural lives, in equal shares; and, upon the decease of my
said three daughters, the share of each of them so dying unto her children &c., their heirs
&c., or child &c. (with provision as to age as before); and, in case of the death of any of
my said daughters without having a son who shall attain &c. or a daughter who shall attain
the (the specified ages), I give such share as such child or children would have had to the
child or children of my other two daughters, in equal shares, their heirs &c.; and, if only one
daughter leaves issue that shall attain &c., then the whole of the said premises to such
issue, if more than one, in equal shares, as tenants in common &c., their heirs, &c.; if only
one, to such one &c.

Codicil :

I hereby revoke that part of my will whereby I give nine freehold houses &c. to my son
J. D. and his heirs, and my will is that my daughters A. and E. M. should enjoy them.
I hereby give the said freehold houses to my said daughters A. and E. M. equally and
jointly between them, and to the survivor of them, and, after their decease, to their child or
children equally, and, if they should both die leaving no child or children, then the said
freeholds to go as ordered by my said will. A. and E. M. died, leaving no issue. A son of
J. D. and children of S., the third sister, survived.

Held that the codicil did not entirely revoke the devise to J. D., but only postponed him
to the two sisters, A. and E. M., and that, on the decease of both without issue, he, and not
the children of S., became entitled; and that, if the devise to J. D. had been revoked
by the codicil, the children of S. could not take under the will, because the contingency on
which she was to take according to the devise had not happened.

Volume XVIII. *Thomas Dolley*, being seised in fee of certain
 1852. and possessed of certain leasehold premises and
 estate, made his will and codicil, respectively bearing
 12th *June* 1819 and 20th *March* 1820. The
 parts of the will were as follows (*a*).

The last will and testament of me, *Thomas Dolley*,
Redcross Street, Cripplegate, London, Gentleman:
 I give the whole of the income of my property,
 personal, unto *Thomas Challis*, of &c., and *John*
 of &c., during the period and for the purposes he
 mentioned, that is to say: Upon trust to receive
 income, and pay unto each of my five children
 of 50*l.* (the payments to daughters to be in
 of their husbands). I give to the said *T. C.* and
 my executors and trustees, the sum of 500*l.*
 3*l.* 10*s.* per Cent. Annuities, upon trust to receive
 &c.: payment to be made to testator's daughter
Creswell White during her life, independently of
 band; after her decease the principal to be divided
 among all testator's other children living at her
 and, in case of the death of any such child in the
 of *Margaret*, leaving issue, his or her share to go
 issue or such of them as should attain 21; the
 females to be paid to their sole uses. The testator
 left certain small annuities out of personalty also
 to his sisters *Ann Gwillim* and *Elizabeth Jarvis*,
 servant *Elizabeth Slater*, with benefit of survivorship
 among them, and with reversionary interests to
 testator's youngest daughters *Ann* and *Elizabeth*,
 equal shares: also legacies of 1000*l.* to each of
 last mentioned daughters.

(*a*) It has been thought advisable to set out here as much of
 the will as is material to the following as well as to the present case.

Queen's Bench.
1852.

Doe dem.
EVERS
v.
WARD.

" And, so subjecting all my real and personal estate for the purposes aforesaid and for other the purposes herein, I give to my son *John Dolley* during his natural life my four freehold houses on the West side of *Reynolds Court*, numbers 1, 2, 3 and 4,"
 " likewise a freehold house No. 16 in the said court, nine freehold houses, 1, 2, 3, 4, 5, 6, 7, 8 and 9 in *Angel Court, Grub Street* aforesaid, one freehold house numbered 188 in *High Holborn* in the county of *Middlesex*, seven leasehold houses in *Grub Street*, and two in *Bell Court, Grub Street*, and one other leasehold house in *Grub Street*, and also nine leasehold houses in *Hanover Court, Grub Street*, and all my fifteen leasehold houses in *Sun Court, Grub Street*, all in the parish of *Cripplegate, London*, with all rights and appurtenances to the said several houses belonging:" "likewise all the land tax" &c (land tax on various properties, redeemed by the testator) " And, from and after the decease of my son, I give all the before mentioned freehold and leasehold houses, land tax and premises aforesaid unto his children now born or hereafter to be born, if a son or sons, that shall live to the age of 23 years, and, if a daughter or daughters, that shall live to the age of 21 years, their respective heirs, executors, administrators and assigns, according to the nature or tenure thereof, as tenants in common. And, in case of the death of any child or children, if a son or sons, under the age of 23 years, and, if a daughter or daughters, under the age of 21 years, the share and shares of all such child or children so dying shall go to the survivors and survivor of them, sons and daughters, attaining the said age of 23 or 21 years, their heirs, executors, administrators and assigns in equal share: and, in case my said son has only one

Volume XVIII. child, if a son, that shall live to the age of 23 years, or,
1852. if a daughter, that shall live to the age of 21 years,

Doe dem.

EVERS

v.
WARD.

I give all the before mentioned premises, shares and land tax, unto such only child so attaining such age, his or her heirs, executors, administrators and assigns: And, further, in case all the children of my said son, if a son or sons, shall die under the age of 23 years, or, if a daughter or daughters, shall die under the age of 21 years, then I give all the before mentioned freehold and leasehold premises, shares and land tax, unto the said *T. C. and J. B.*, their heirs, executors and administrators, during the respective lives of my daughters *Sarah Ward*, *Ann Dolley* and *Elizabeth Maria Dolley*, upon trust to pay, or permit my said daughters to receive and take, the rents, profits," &c., "for and during their respective natural lives, in equal shares" (and independently of husbands), "if my estate in the leasehold part so long continues. And, upon the decease of my said three daughters, I give the share of each of them so dying unto her children, if a son or sons, living to the age of 23 years, if a daughter or daughters, living to the age of 21 years, his, her and their heirs, executors, administrators and assigns, if more than one, in equal shares, and if only one child, to such only child, if a son, at 23, and if a daughter, at 21, his, her or their heirs, executors, administrators and assigns. And, further, in case of the death of any one or more of my said daughters without having a son who shall live to the age of 23 years, or daughter who shall live to attain the age of 21 years I give such part and parts such children or children would have had and be entitled to as aforesaid unto the child or children of my said daughter having issue living, if a son or sons, to the age of 23 years, or =

daughter or daughters, to attain the age of 21 years: if two daughters have such children or child, to them, her or him as taking in equal shares from his, her or their mother, his, her or their heirs, executors, administrators and assigns: and, if only one of my said daughters leaves issue that lives to attain the ages aforesaid, then I give the whole of such freehold and leasehold premises and land tax unto such issue, if more than one, in equal shares, as tenants in common, their heirs, executors, administrators and assigns, and, if only one, to such one, his or her heirs, executors, administrators and assigns."

*Queen's Bench.
1852.*

Doe dem.
EVERS
V.
WARD.

The testator then ordered that the rents, profits, &c. of the said premises should (subject as aforesaid), after all necessary outgoings for repairs and insurance, be received by such person as testator's said son should appoint, and be applied for the maintenance of the children or child of testator's said son, or of testator's said three daughters, during their respective minorities, or until they became entitled as aforesaid; but, if no direction, as testator's executors and trustees might think proper for that or other purposes.

"I give to the said *Thomas Challis* and *John Brogden* all those my five freehold houses in *Harp Court*, Nos." &c., "nine freehold houses in *Black Horse Court*, Nos." &c., "all in the parish of *Saint Bride* otherwise *Saint Bridget*, *Fleet Street, London*, and my leasehold house No. 3 *Crane Court, Fleet Street, London*, with all rights and appurtenances to the said last mentioned houses belonging; also ten shares in the *Eagle Insurance, London*; to hold all the said last mentioned freehold and leasehold premises and *Eagle* insurance shares unto the said *T. C. and J. B.*, their heirs, executors, administrators and assigns, according to the nature thereof respectively, during the natural life of my said daughter *Sarah Ward*,

Volume XVIII. upon trust that they my said trustees, or the survivor of them, his heirs, executors and administrators, do pay, or permit my said daughter *Sarah Ward* from the

1852.

Doe dem.
EVERS
v.
WARD.

quarter day next after my decease to receive and take, the rents, issues and annual profits thereof respectively for and during the term of her life, to and for her own sole and separate use only, independent of the debts, controul or engagements of her present or any future husband, if my estate and interest in the leasehold part so long continue." " And, from and after the decease of my said daughter *Sarah Ward*, I give the said last mentioned freehold and leasehold premises and *Eagle* shares unto such of her children as she now has or may have, if a son or sons at his or their age or ages of 23 years, and if a daughter or daughters at her or their age or ages of 21 years, their respective heirs, executors, administrators and assigns, according to the nature thereof, as tenants in common. And, in case of the death of any child or children of her my said daughter, if a son or sons under the age of 23 years, and a daughter or daughters under the age of 21 years, the share or shares of each such child, son or daughter, so dying, to go to the survivors or survivor of such child and children, being a son or sons, on his or their attaining the said age of 23 years, and, if a daughter or daughters, on her or their attaining the age of 21 years and their heirs, executors, administrators and assigns in equal shares as tenants in common. And, in case my said last named daughter has only one child, if a son, that shall live to the age of 23 years, and, if a daughter, that shall live to the age of 21 years, I give all the said last mentioned premises and *Eagle* shares unto such only child so attaining such age, his or her heirs, executors, administrators and assigns for ever, or during

Queen's Bench.
1852.

Doe dem.
EVEAS
v.
WARD.

my estate in the leasehold part, and direct that the rents, issues, interest and annual produce thereof shall, until my said grandchildren attain such ages as aforesaid, be paid and applied for or towards their maintenance and education. And, further, in case all the children of my said daughter *Sarah*, if a son or sons, shall die under the age of 23 years, or, if a daughter or daughters, shall die under the age of 21 years, then I give all the said last mentioned premises and *Eagle* shares unto the said *T. C.* and *J. B.*, their heirs, executors and administrators, during the respective lives of my said son *John Dolley* and daughters *Ann Dolley* and *Elizabeth Maria Dolley*, upon trust to pay, or permit my said son and two daughters to receive and take the rents, profits, interest or other the annual income thereof, for and during their respective natural lives, in equal shares, the shares of my said daughters to be for their separate uses only, and independent of any husband or husbands, if my estate in the leasehold part so long continue. And, upon the decease of my said son and two daughters, I give the share of such of them so dying unto his or her children, if a son or sons, living to the age of 23 years, and, if a daughter or daughters, living to the age of 21 years, his, her or their heirs, executors, administrators and assigns, if more than one in equal shares, and, if only one child, to such only child, his or her heirs, executors, administrators and assigns. And, further, in case of the death of my said son or either of my said two daughters without leaving a child, if a son, who shall live to the age of 23 years, or, if a daughter or daughters, who shall live to attain the age of 21 years, I give the part and parts such child or children, sons or daughters, would have had and been entitled unto as aforesaid unto the child or children of my said son and two daughters

Volume XVIII. having issue, son or sons, daughter or daughters, living at the time of my death, to attain the ages aforesaid; if two of my said last named children have such children or child, to them, her or him, as taking in equal shares from his, her or their father's mother, his, her or their heirs, executors, administrators and assigns; and, if only one of them my said son or two daughters leaves issue that lives to attain the age aforesaid, then I give the whole of such freehold and leasehold premises and *Eagle* shares unto such issue if more than one, in equal shares, their heirs, executors, administrators and assigns, as tenants in common: and if only one, to such one, his or her heirs, executors, administrators and assigns. And it is also my will that the rents, profits and interest of the said last mentioned premises and shares shall, after all necessary outgoings for repairs, ground rent and insurance, be applied towards the maintenance of the children of my said daughter *Sarah*, or of my said son and two other daughters' children until they become respectively interested as before mentioned.

“I give to the said *T. C.* and *J. B.* all those my two freehold houses numbered 11 and 12, situate on the west side of *Vere Street, Clare Market*, in the county of *Middlesex*, seven freehold houses in *Reynold's Court*, Nos. 5, 6, 8, 9, 10 and 11, three houses adjoining in *Butler's Alley*, Nos. 11, 12 and 13, all my four freehold houses in *Coal Lane, Skinner Street*, in the parish of *Saint Sepulchre, London*, Nos. 18, 19, 20 and 21, three freehold houses and premises in *Surrey Place, Cow Lane, Queen Street, Rotherhithe*, in the county of *Surrey*, and a leasehold house in *Winkworth Buildings, City Road*, with all rights and appurtenances to the said last mentioned houses and premises belonging, likewise all the land lying on the last mentioned estates redeemed by me, and to

Doe dem.
EVERS
v.
WARD.

shares in the *Eagle* insurance, to hold all the said last mentioned premises, land tax and shares, unto the said *T. C.* and *J. B.*, their heirs, executors, administrators and assigns, according to the tenure thereof, during the natural life of my daughter *Ann Dolley*, upon trust that they the said *T. C.* and *J. B.* and the survivor of them do pay, or permit my said daughter *Ann* from the quarter day next after my decease to receive and take, the rents and profits of all the last mentioned freehold and leasehold premises, land tax and *Eagle* shares, for and during the term of her natural life, to and for her own sole and separate use and benefit only, independent of the debts, controul or engagements of any husband or husbands with whom she may marry. And, from and immediately after the decease of my said daughter *Ann*, I give the said last mentioned premises unto such child or children as she may have" (attaining 23, if son or sons, 21, if daughter or daughters, as before), "their respective heirs, executors, administrators and assigns, as tenants in common: and, in case of the death of any child or children of her my said daughter *Ann*," if son or sons, under 23, if daughter or daughters, under 21, "the share or shares of each child or children dying under such ages to go to the survivors and survivor of such child and children attaining the said age or ages, their heirs, executors, administrators and assigns, in equal shares as tenants in common. And, in case my said daughter *Ann* has only one child," attaining 23, if a son, or 21, if a daughter, "I give all the said last mentioned premises unto such only child, if a son, at his age of 23 years, or, if a daughter, at her age of 21 years, his or her heirs, executors, administrators and assigns. And, further, in case my said daughter *Ann* shall die without issue, or in case all the children which my said daughter may have shall die,"

Queen's Bench.
1852.

Doe dem.
EVERS
v.
WARD.

Volume XVIII. if sons, under 23, if daughters, under 21, "then I give all
1852. the said last mentioned premises unto the said *T. C.* and
J. B., their heirs, executors, administrators and assigns
Doe, dem
Evers
v.
Ward.
during the respective lives of my said son *John Dolley*
and daughters *Sarah Ward* and *Elizabeth Maria Dolley*,
upon trust to pay, or permit my said son and two last
named daughters to receive and take, the rents, profits
and annual income thereof for and during their respective
natural lives in equal shares, the share of my said two
daughters to be for their respective uses only and inde-
pendent of any husband or husbands. And, upon the
decease of my said son and two last named daughters,
I give the share of such of them so dying unto his
or her children," if son or sons at 23, if daughter or
daughters at 21, "his, her and their heirs, executors,
administrators and assigns, if more than one in equal shares
as tenants in common, and, if only one child, to such only
child, if a son," at 23, if a daughter, at 21, "his or her
heirs, executors, administrators and assigns. And,
further, in case of the death of my said son or either of my
said two daughters without leaving a child who shall live
to attain the ages aforesaid, I give the part and parts
such children or child would have had and been entitled
unto as aforesaid unto the child or children of my said
son and two daughters having issue living, if a son, to
attain" 23, or a daughter, 21; "if two of my said last
named children have such children or child, to them
her or him, their, his or her heirs, executors, adminis-
trators and assigns, as taking equal shares from his or he
father or mother, his, her and their heirs, executors
administrators and assigns: and, if only one of them my
said son and two daughters leaves issue, if a son that
lives to" 23, or, if a daughter, to 21, "then I give the
whole of such last mentioned estate and premises unto

such issue, if more than one, in equal shares, their respective heirs, executors, administrators and assigns, as tenants in common: and, if only one, his or her heirs, executors, administrators and assigns. And it is my will that the rents and profits of the last mentioned premises shall, after all necessary outgoings for repairs and insurance, be applied for or towards the maintenance of the children of my said daughter *Ann*, or of my said son and two other daughters' children, until they become entitled to the principal and estates last mentioned.

" I likewise give to the said *T. C.* and *J. B.* all those my four other freehold houses in *Sea Coal Lane, Skinner Street*, aforesaid, numbers 22, 23, 24 and 25, all those six freehold houses in *Dolley's Place, Ropemaker's Street, Nos. 1, 2, 3, 4, 5 and 6*, three freehold houses on the East side of *Reynold's Court*, numbers 16, 17 and 18," &c. (paying a moiety of certain expences of repairs &c.): "and I do hereby subject and charge the said last mentioned nine houses with the payment of such moiety of the said expences accordingly: and one freehold house behind Mr. Pocock's dwelling, all in the said parish of *Saint Giles Cripplegate*; also one freehold house in *Tash Court* in the parish of *Saint Andrew Holborn*, with redemption of land tax; likewise my leasehold house and premises at *Chinkford* in the parish of *Walthamstow*; with all rights and appurtenances to the said last mentioned houses belonging; and one share in *The Imperial Insurance, London*: To hold all the said last mentioned houses, shares and premises unto the said *T. C.* and *J. B.*, their heirs, executors, administrators and assigns, during the natural life of my daughter *Elizabeth Maria Dolley*, upon trust that they, the said *T. C.* and *J. B.*, and the survivor of them, and his heirs, executors or administrators, do pay, or permit my daughter the said

Queen's Bench.
1852.

Doe dem.
EVERS
v.
WARD.

Volume XVIII. *Elizabeth Maria*, from the quarter day next after my
1852. decease, to receive and take, the rents and profits of the

_____ said last mentioned premises and share for and during
Doe dem.
Evers
v.
Ward.
the term of her natural life" (independently of any
husband, &c.; her receipt alone to be a discharge):
"And, from and immediately after the decease of my
said daughter *Elizabeth Maria*, I give all the said last
mentioned premises and share unto such of her children
as she may have, if a son or sons, who shall live to the
age of 23 years, and, if a daughter or daughters, who
shall live to the age of 21 years, their respective heirs,
executors, administrators and assigns, as tenants in com-
mon: And, in case of the death of any child or children
which my said daughter *Elizabeth Maria* may have, if
a son or sons, under the age or ages of 23 years, or, if a
daughter or daughters, under the age of 21 years, the
share or shares of such child or children so dying to go
to the survivors and survivor of such child and children
attaining such ages, if more than one, their heirs, exe-
cutors, administrators and assigns, in equal shares as
tenants in common; and, in case my said daughter
Elizabeth Maria has only one child, if a son, that shall
live to the age of 23 years, or, if a daughter, that shall
live to the age of 21 years, I give all the said last men-
tioned premises unto such only child so attaining such
age, his or her heirs, executors, administrators and assigns.
And also, in case all the children of my said daughter
Elizabeth Maria shall die, if a son or sons, under the
age of 23 years, or, if a daughter, under the age of
21 years, or if she has none, I give all the said last
mentioned premises unto the said *T. C.* and *J. B.*
their heirs, executors and administrators, during the
respective lives of my said son *John Dolley* and daugh-
ters *Sarah Ward* and *Ann Dolley*, upon trust to pay, o

Queen's Bench.
1852.

Doe dem.
EVERS
v.
WARD.

permit my said son and two last named daughters to receive and take, the rents, profits and annual income thereof for and during their respective natural lives in equal shares, the shares of my said two daughters to be for their separate uses only and independent of any husband or husbands: and, upon the decease of my said son and two last named daughters, I give the share of such of them so dying unto his or her children, if a son or sons, living to attain the age of 23 years, and, if a daughter or daughters, living to the age of 21 years, his, her and their heirs, executors, administrators and assigns, if more than one, in equal shares as tenants in common, and, if only one child, to such only child, his or her heirs, executors, administrators and assigns. And, further, in case of the death of my said son or either of my said two daughters, without leaving a child, if a son, who shall live to attain the age of 23 years, or, if a daughter, who shall live to attain the age of 21 years, I give the part and parts such children or child would be entitled to as aforesaid unto the child or children of my said son and two daughters having issue, if a son or sons, living to the age of 23 years, and, if a daughter or daughters, living to attain the age of 21 years; if two of my said last named children have such children or child, to them, his or her heirs, executors, administrators and assigns, as taking in equal shares from his or her father or mother, his, her and their heirs, executors, administrators and assigns; and, if only one of them, my said son and two daughters, leaves issue that lives, if a son or sons, to the age of 23 years, if a daughter or daughters, lives to attain the age of 21 years, then I give the whole of such last mentioned estate and premises unto

Volume XVIII. such issue, if more than one, in equal shares, their re-
1852. spective heirs, executors, administrators and assigns;

Doe dem.
EVERS
V.
WARD.
and, if only one, to such one, his or her heirs, executors, administrators and assigns, at the ages aforesaid. And it is my desire that the rents, produce and profits of the said last mentioned premises shall, after all deductions for the purposes aforesaid, be applied for or towards the maintenance and education of the children of my said daughter *Elizabeth Maria*, and of my said son and two other daughters' children, until entitled to the said estates and premises.

“ I give unto the said *T. C.* and *J. B.*, their executors, administrators and assigns, all such other leasehold mes-
suages and estates as I may be possessed of or entitled unto at my decease, save and except my dwelling house in *Red Cross Street*, upon trust that they or the survivors or survivor of them, his executors or administrators, do and shall receive the rents or other the annual produce thereof during the terms in the leases under which I may hold the same, and, after paying the rents reserved by such leases, and performing the covenants contained therein respectively for repairs and insurance, or otherwise from time to time after answering the purposes of this my will, to pay the net produce of such rents and profits unto and equally amongst my son *John Dolley*, daughters *Sarah Ward*, *Ann Dolley* and *Elizabeth Maria Dolley*, during their respective lives, the shares of my said daughters to be paid to them on their receipts only for their sole and separate uses, independent of the debts” &c. “ of any husband:” “ and, upon the decease of my said son and four daughters or any of them, I give the interest and also the principal unto and for the use and benefit of my said five children and surviving children and their

children, such children taking as and from their father and mother, with such restrictions as to my said daughters, with all such and the like benefit of survivorship and other accrue unto and amongst all my children and their children at such ages and times, with maintenance, as before mentioned with respect to the specific property hereinbefore by me given unto or in trust for my said son and three last named daughters, *Sarah Ward, Ann Dolley and Elizabeth Maria Dolley* and their issue, with remainder over as aforesaid."

Queen's Bench.
1852.

Doe dem.
EVERS
v.
WARD.

(Then followed a bequest of a leasehold house at *Hoxton* in trust for testator's grandson *William Ward*, and, in case of his death under 23, for his eldest brother or sister first attaining that age, his or her executors, &c.: and, after some other bequests of personality, and directions, the will proceeded:)

"I give to my said two unmarried daughters my present dwelling house in *Red Cross Street*, to hold to them, their executors, administrators and assigns, for all such term and estate as I may have therein at my decease, they paying the rent and performing the covenants mentioned in the lease under which I hold or may hold the same from the end of the quarter day next after my decease, until which period I direct all rent, taxes and other outgoings shall be paid out of my general personal estate. And I likewise give to them my said two unmarried daughters, in equal shares, all the household furniture, plate, linen, china, glass and every other thing in my said house belonging to me, except money and securities for money, or what may belong to other property. And it is my will and desire that all other the residue of my personal property may be sold or otherwise converted into money by my said executors as soon as may be after my decease, and that the money,

Volume XVIII. as the same shall be received, or so much as may be
 1852. necessary, be, in the first place, with other my property,

Doe dem.
 EVERs
 v.
 WARD.

paid, applied and laid out for or towards the general uses and purposes of this my will: and in the first place" for payment of certain pecuniary legacies to testator's grandchildren on attaining, respectively, 23 and 21, or on marriage, and of certain sums in the meantime for maintenance, education, &c.; with a bequest of the remainder of such residue to the testator's son and his daughters *Sarah, Ann and Elizabeth Maria* in case of the deaths of grandchildren.

"And, in case of the death of all my grandchildren now born or hereafter to be born, if a son or sons," under 23, or, if a daughter or daughters, under 21, "without leaving any child or children them or any of them surviving, I give all my freehold and leasehold estates and other property, hercinafore by me given in trust or for the use and benefit of my said five children for their respective lives with remainders over as before mentioned, unto and equally amongst all the children of my said sister *Ann Gwillin* living at my decease, their respective heirs, executors, administrators and assigns, according to the nature and tenure thereof, as tenants in common.

Then followed certain leasing powers and other provisions, which it is unnecessary to state.

There was a codicil as follows.

"This first revocation and codicil to my last will and testament, made this day and dated underneath, is as follows. I revoke that part of my will whereby I give to my daughter *Margaret Creswell White* the dividends of 5000*l.* 3½ per cent. annuities; and instead thereof I give her the said *M. C. W.* the interest or dividends arising from 7000*l.* 3 per cent. annuities, to be paid to her only every half year during her natural life by my

trustees named in my said will; and at her decease the *Queen's Bench.*
principal to be divided as directed by my last will. 1852.

"I likewise hereby revoke that part of my last will and testament whereby I give one freehold house, No. 188, *High Holborn*, and likewise nine freehold houses in *Angel Court*, *Grub Street*, in the city of *London*, unto my son *John Dolley* and to his heirs: And my will is that my daughters *Ann Dolley* and *Elizabeth Maria Dolley* should enjoy them. I hereby give and bequeath the said freehold ground and houses, together with one freehold house in *Grub Street* aforesaid, the corner of *Phillip Court*, and the whole of *Phillip Court*, lately agreed for to be purchased of *Mrs. Cipriana* and her trustees, to my said daughters *Ann Dolley* and *Elizabeth Maria Dolley*, equally and jointly between them, and to the survivor of them; and, after their decease, to their child or children equally; and, if they should both die leaving no child or children, then the said freeholds to go as ordered by my said will. And further it is my will that, if I die before my agreement is fulfilled and the estate paid for, and likewise the nine houses now agreed to be built in *Angel Court* are paid for, the said estate and buildings and repairs wanted in *Phillip's Court* are paid for, the same shall all be paid for and completed before any division of my personal estate takes place, and all the expenses thereof shall be paid out of my personal estate. I give these estates to my said daughters for their use only, not subject to the debts or controul of any husband or husbands they hereafter may marry. *Thos. Dolley.* Signed this 20th day of *March*, 1820, by me," &c.

The said *Thomas Dolley* died seised and possessed of the premises and personal estate in the will and codicil

Volume XVIII. respectively mentioned, on 26th *March* 1821, without altering or revoking the said will and codicil, except so far as the will was altered or revoked by the codicil.

Doe dem.
EVERS
v.
WARD.

The freehold houses mentioned in the codicil to have been agreed to be purchased of Mrs. *Cipriana* and her trustees were, in the life time of the said *Thomas Dolley*, conveyed to him in fee; and he died seised thereof.

At the date of the will and codicil, and at the time of the death of the said *Thomas Dolley*, he had one son, the said *John Dolley*, and four daughters, viz. the said *Ann Dolley*, *Elizabeth Maria Dolley*, *Sarah Ward* and *Margaret Creswell White*.

The said *Margaret Creswell White* died in 1834. The said *Ann Dolley*, having married one *Isaac Ackerman*, died on 31st *March* 1847, never having had a child. The said *Elizabeth Maria Dolley*, having married on *Joseph Doxsey*, died on 18th *August* 1838, never having had a child. The said *Sarah Ward* died on 27 February 1830, leaving her surviving three sons and four daughters, viz. *William Ward*, born in 1804, *Thomas Ward*, born in 1810, *James Ward*, born in 1814, *Sarah Ward*, born in 1806, *Mary Ward*, born in 1812, *Ellen Jane Ward*, born in 1812, and *Elizabeth Ward*, born in 1821.

Thomas Ward, by his will dated on or about 12 September 1846 (a), devised all his real property whatsoever and wheresoever unto and among his sisters *Mary*, *Ellen Jane*, and *Elizabeth Ward*, as tenants in common in fee, and died in *August* 1846 (a).

Mary Ward married *George Verry*; *Ellen Jane Ward* married *James Nixon*; and *Elizabeth Ward* married *Robert Letchford*; which said *G. Verry*, *J. Nixon* and

(a) *Sic in the Paper Book.*

R. Letchford, together with the said *William Ward*, are Queen's Bench.
1852.

The said *John Dolley*, the only son and heir at law of the testator *Thomas Dolley*, on 25th June 1806, intermarried with *Mary Ann Carr*, by whom he had issue *Mary Ann Dolley* (who was born before the date of the testator's will, viz. on 31st January 1809), *Elizabeth Sarah Dolley*, who was born on 26th (a) December 1820, after the date of the codicil but before the death of the said *Thomas Dolley*, and *Clarissa Dolley*, who was born on 5th June 1826, after the death of the testator. The said *John Dolley* never had any other children.

Doe dem.
EVENS
v.
WARD.

The said *Mary Ann Dolley* (the eldest daughter of the said *John Dolley*, and one of the lessors of the plaintiff) on 21st December 1834 intermarried with *Thomas Henry Evers* one of the lessors of the plaintiff.

The said *Elizabeth Sarah Dolley* (the second daughter of the said *John Dolley*), having, on 5th April 1848, married *George Huddleston*, died on 26th April 1849, leaving her surviving her husband the said *George Huddleston* and a son *George Carr Huddleston*, who was born on 21st April 1849, and died about three months afterwards, viz. on or about 16th July 1849. The said *Clarissa Dolley* (the youngest daughter of the said *John Dolley*) died an infant of the age of two (a) years.

The said *John Dolley* died on 10th October 1850.

The questions for the opinion of the Court were:

1. Whether, upon the death of *Elizabeth Maria Dolley* and *Ann Dolley*, leaving no child or children, any of the freeholds in the introductory part of this case mentioned and alleged to be devised to them by the codicil passed after the death of the said *John Dolley* to his children.

(a) See p. 226, post.

Volume XVIII. 2. Whether the lessors of the plaintiff are entitled to recover the whole or part of the property mentioned in the codicil as purchased of Mrs. *Cipriana* and her trustees.

Doe dem.
EVERS
v.
WARD.

If the Court should be of opinion that any of the said freeholds so devised by the codicil as last aforesaid did so pass, then the verdict was to be entered for the plaintiff for two undivided third parts or shares thereof, or for such other proportion thereof as the Court might adjudge to him. As regards the property purchased of Mrs. *Cipriana*, if the Court should be of opinion that the lessors of the plaintiff are entitled to the whole or any part of it, the verdict to be entered for the plaintiff accordingly. But, if the Court should be of a contrary opinion, then the verdict was to be entered for the defendants.

The case was argued in this term (*a*).

Malins, for the plaintiff. The lessors of the plaintiff are entitled to one moiety of the estates mentioned in the declaration. The devise to *John Dolley* and his children gave to him a life estate, and to them vested estates in remainder, immediately on the testator's death; *Doe dem. Dolley v. Ward* (*b*): the question is, what effect the codicil had on those several estates; whether it operated upon them as a partial or as a total revocation. The true construction is, that the testator's daughters *Alex* and *Elizabeth Maria* were, for their respective lives only, placed before *John*, but that, after their deaths, the devise to *John* and his children took its course. The codicil speaks of a gift made by the will to *John Dolley*

(*a*) January 16th. Before Lord *Campbell* C. J., *Patteson, Coleridge* = and *Wightman* Js.

(*b*) 9 *A. & E.* 582.

"~~and~~ to his heirs;" but this is evidently a misrecital Queen's Bench.
of the will, and an erroneous use of the word "heirs" 1852.

for "children;" and the Court will so understand the expression, as was done in *Right v. Creber* (a). Even if it should be held that a fee simple in the premises passed to the two daughters by the words "my will is that my daughters should enjoy them," it is immaterial, the daughters having left no issue. There is no objection in principle to a codicil revoking a prior devise partially, and to the extent only of the new interest which is created. The testator's intention seems to have been simply that the two daughters and their children should precede the son, each daughter, and her children after her, taking estates for life, according to *Doe dem. Norris v. Tucker* (b). [Coleridge J. There is not only a change of places, but a general revocation of the gift to John Dolley. Lord Campbell C. J. Supposing there had been no express words after the clause "I likewise hereby revoke" &c.: is not the revocation complete?] But the words which follow, "and, if they should both die leaving no child or children, then the said freeholds to go as ordered by my said will," operate as if the devise in the will to John Dolley and his children were again inserted in this place. A similar construction was given to a codicil containing the words "shall go and descend as is by my said will directed," in *Graves v. Hicks* (c). [Patteson J. If the words of the devise are repeated in the codicil, there is a devise to the daughters Ann and Elizabeth Maria, who are supposed to be dead.] The remainder, after them, would take effect in favour of their children. The construction

Doe dem.
EVERS
v.
WARD.

(a) 5 B. & C. 866.

(b) 3 B. & Ad. 473.

(c) 5 A. & E. 38. See p. 55.

Volume XVIII. which must be contended for on the other side would
 1852. require the codicil to be read "as ordered by my said
 Doe dem.
 EVANS will in case of my son dying without issue." It is
 V.
 WARD. unnecessary to cite cases as to the operation of codicils
 inconsistent with the provisions of a will. There is no
 objection, in principle, to a codicil revoking a prior
 devise partially, and to the extent only of the new
 interest which is created. The rule, as laid down in
 1 *Jarman on Wills*, 160, is "not to disturb the dispo
 sitions of the will further than is absolutely necessary
 for the purpose of giving effect to the codicil." *Duffield*
v. Duffield (a) is a leading authority on the subje~~c~~
Thomas v. Evans (b) confirms the same doctrine. [Lord
Campbell C. J. There is no doubt that the will operat~~s~~
 so far as it is not revoked : the question here is, how f~~r~~
 it is revoked.] The words "revocation" and "revok~~e~~
 are used in the first clause of the codicil, where there
 no absolute revoking, but only a substitution of fun~~ctio~~
 [Lord *Campbell C. J.* You say that the codicil may b~~ut~~
 construed as if no mention were made of revoking, b~~ut~~
 the words had been "I hereby alter that part of my las~~t~~
 will" &c.] That is so. The lessor of the plaintiff is,
 therefore, entitled to the moiety of the estates, including
 those purchased of Mrs. *Cipriana*, as to which no question
 of law arises. (No further notice of this part of the case
 is deemed necessary.)

Butt, contrà. The codicil is a revocation of the whole
 devise referred to, so far as it relates to *John Dolley* and
 his children ; and, on the deaths of *Ann* and *Elizabeth*
Maria without issue, *Sarah* and her children took

(a) 3 *Bligh, N. S.* 260.

(b) 2 *East*, 488.

Queen's Bench.
1852.

Do. dem.
EVERS
v.
WARD.

remainder. Whether, in the clause of the codicil “~~w~~hereby I give” &c. “unto my son *John Dolley* and his heirs,” the word “heirs” be read as “children” or not, the effect is the same: there is an entire revocation of the clause in their favour. They are struck out of the will, and *Ann* and *Elizabeth Maria* substituted; and on their deaths the freehold goes “as ordered by my said will;” that is, the contingent remainder originally given by the will to the children of *Sarah Ward* takes effect according to the due course of the limitations; nothing is added to the will or taken from it except the first mentioned devise. [Patteson J. By the will, the descent of the estates to *Sarah* and her children depended on a contingency which, according to your view, could no longer have any effect, after the codicil; the death of *John* without leaving children. You must consider the codicil as doing away with the necessity for that contingency.] The new devise to *Ann* and *Elizabeth Maria* and their children is substituted for everything that relates to *John* and his; with a limitation over (by the operation of the will) to *Sarah Ward* and her children by way of contingent remainder. It is not a mere postponement of *John* and his children; for no place is assigned at which they are to come in; and, if they do so, *Sarah* and her children have no longer a place. [Lord Campbell C. J. The codicil does not make any direct provision for the case of *Ann* and *Elizabeth Maria* leaving a child, or having a child which has died.] Sufficient guidance will be found in the limitations of the will following the devise to *John* and his children. The codicil must be read with these. [Lord Campbell C. J. They do not provide for the contingency of the two daughters leaving children. Patteson J. Do the children

Volume XVIII. of Mrs. *Ward* take the entirety on the deaths of *An*
 1852. and *Elizabeth Maria?*] They do. [Patteson J. Unde
 Doo dem.
 EVERE
 v.
 WARD.
 the will, Mrs. *Ward*, if she had lived, could only hav
 taken a third.] By the codicil she would take th
 entirety for her life, after the deaths of her sisters. Th
 codicil is inartificial, and not easily explained: but th
 result of the whole is that *John* and his issue are pu
 out of the will, and the three sisters and their childre
 written in.

Malins, in reply. The intention was only to vary the
 order of limitations. The place of *John* and his children
 is after the sisters *Ann* and *Elizabeth Maria*, instead o
 being before the three. [Coleridge J. That displaces
Sarah; yet no such intention is expressed.] She is
 merely postponed as *John* is. The words "as ordered
 by my said will" restore the former arrangement after
 the decease of the two sisters. [Patteson J. You make
 these words as it were a revocation of the revocation.
 They operate so. There are difficulties as to the suc
 cection of *Sarah*, in any view of the will and codicil.
 If her interest is contingent on the events specified by
 the will in the devise to *John* and his children, the
 contingency is too remote. If the codicil sets that
 devise entirely aside, there remains no event on which
Sarah could be entitled to take "as ordered by" the
 testator's said will. Then the revocation is absolute,
 and the descendants of *John Dolley* are entitled as heirs
 at law.

Cur. adv. vult.

Lord CAMPBELL. C. J., in the same term (*January*
 30th), delivered the judgment of the Court.

This case depends upon the construction to be put upon the will and codicil of *Thomas Dolley*. By the will he devises the nine houses in question to his son *John* for life, and after his death to his children who should attain a certain age: and, in case all such children should die under that age, he then gives the houses in question to trustees, to permit his three daughters, *Sarah Ward*, *Ann Dolley* and *Elizabeth Maria Dolley*, to receive the rents during their lives in equal shares, and after their decease to their children in fee. The codicil is in these words: "I likewise hereby revoke that part of my last will and testament whereby I give" (the houses in question) "unto my son *John Dolley* and to his heirs" (evidently a mistake for his children): "And my will is that my daughters *Ann Dolley* and *Elizabeth Maria Dolley* should enjoy them. I hereby give and bequeath the said freehold ground and houses" "to my said daughters *Ann Dolley* and *Elizabeth Maria Dolley*, equally and jointly between them, and to the survivor of them; and, after their decease, to their child or children equally; and, if they should both die leaving no child or children, then the said freeholds to go as ordered by my said will."

The daughters *Ann* and *Elizabeth Maria* both died leaving no child. *John Dolley* the son died in 1850, leaving a daughter, the lessor of the plaintiff *Mary Ann Evers*, who was born in the lifetime of the testator and is *John Dolley's* only surviving child: but he had another daughter, *Elizabeth Sarah*, also born in the lifetime of the testator, who married and had a son; but she and her son both died in the lifetime of *John Dolley*. The defendants are children of *Sarah Ward* the other daugh-

Queen's Bench.
1852.

Doe dem.
Evers
v.
Ward.

Volume XVIII. ter of the testator ; she is also dead. The lessors of the
1852.

Doe dem.
EVERS
v.
WARD.

plaintiff contend that the effect of the codicil is to revoke the devise to *John* and his children partially only, so as to postpone them to the daughters *Ann* and *Elizabeth Maria* and their children, but, on their death without any child, to restore the devises in the will and to let in *John Dolley* and his children to take prior to *Mrs. Ward* and her children : also that the lessors of the plaintiff would be entitled to a moiety of the houses in question, the other moiety being in the heir of the son of *Elizabeth Sarah*, who survived his mother about three months.

The defendants contend that the effect of the codicil is to revoke the devise to *John* and his children altogether, and to let in the children of *Mrs. Ward* in the same manner as if *John* had had no children.

It is plain by the codicil that the testator intended to prefer his daughters *Ann* and *Elizabeth Maria* to his son *John*, and that the revocation of the devise to *John* and his children was introduced to effectuate that intention : but there is nothing in the codicil shewing any intention to prefer *Mrs. Ward* and her children to *John* and his children, unless it be found in the revocation itself. Then, the words "to go as ordered by my said will" would not be complied with by holding that *Mrs. Ward's* children take the houses when there is a child of *John* living, and who has attained the age required by the will, as *Mrs. Evers* has attained, because the will orders the estate to go to *Mrs. Ward* jointly with the two other daughters, and to their children afterwards, *only* in the event of *John* not having such child ; and, even if the devise to *John* and his children be absolutely revoked by the codicil, still the contingency on which

by the will the estate is ordered to go to Mrs. *Ward* and her children is not revoked by the codicil, and has not happened: Mrs. *Ward*'s children, therefore, cannot take "as ordered by" the will; and, if *John* and his children do not take at all by reason of the revocation, there is no devise of the inheritance after the death of *Ann* and *Elizabeth Maria* without a child, and the lessor of the plaintiff Mrs. *Evers* is entitled to the whole as heir at law of the testator. We are however of opinion that she is entitled to a moiety only.

The general rule is that a revocation by subsequent will or codicil, whether by express words of revocation or by devise inconsistent with the former devise, shall operate only so far as is necessary to effectuate the intention of the testator: *Duffield v. Duffield* (a), and other cases, establish this rule. We gather clearly from this codicil that the intention of the testator was to prefer *Ann* and *Elizabeth Maria* and their children (if any) to *John* and his children, and nothing more; and that, failing such objects of his preference, his intention was that the will should operate as if there had been no revocation.

There is no dispute between the parties as to the rules by which the case is to be decided. We therefore need not farther examine the decisions by which these rules have been established; and we have only to apply these rules to the will and codicil in question. Doing so, we are of opinion that the verdict must be entered for the lessors of the plaintiff as to a moiety of the nine houses.

As to the property purchased of Mrs. *Cipriana*, it is

Queen's Bench.
1852.

Doe dem.
Evers
v.
Ward.

Volume XVIII. conceded that it does not pass at all by the will or codicil, and that the lessors of the plaintiff are entitled to it in right of Mrs. Evers as heir. The verdict as to that property must be entered for the entirety.

Doe dem.
EVERS
v.
WARD.

Judgment for plaintiff.

[*Friday,
December 6th,
1850.*]

DOE, on the several demises of THOMAS HENRY EVERS and MARY ANN his wife, of the said T. H. EVERS, and of others, *against* THOMAS CHALLIS.

D. (by will made before 1838) devised land to his daughter *E.* for her life, and, from and immediately after her decease, to such of her children as she might have, if

a son or sons, who should live to the age of twenty three years, if a daughter or daughters, who should live to the age of twenty one years, and their heirs, as tenants in common : in case of the death of a son under twenty three or a daughter under twenty one, the share of such child to go to the surviving children attaining the ages named, and their heirs, as tenants in common ; or, if only one should attain the age, to such child in fee : in case all the children of *E.* should die under the ages named, *or if she should have none*, then to *D.*'s daughter *A.* for life, and, upon her decease, to her children, if a son or sons, living to attain the age of twenty three years, if a daughter or daughters, living to the age of twenty one years, and their heirs, as tenants in common ; and, if only one child, to such child in fee : "And, further, in case of the death of" *A.* "without leaving a child, if a son, who shall live to attain the age of twenty three years, or, if a daughter, who shall live to attain the age of twenty one years" (not adding an express provision for the event of *A.* having no child). "I give the part and parts such children or child would be entitled to as aforesaid to *J.*" After *D.*'s death, *E.* died without having had a child : and afterwards *A.* died without having had a child.

Held, by the Court of Q. B., that the limitation over to *J.* might take effect as a contingent remainder upon *A.*'s death without leaving a child attaining the age named.

Held, by the Court of Exchequer Chamber, reversing this judgment, that the limitation over was not to be considered as expectant upon either event, of *A.* dying childless, or her dying without leaving a child that should attain the age, but upon the single event (however it might happen) of her dying without leaving a child that should attain the age, and was therefore an executory devise void for remoteness.

Thomas Dolley, being seized in fee of certain freehold premises, duly made and published his will and codicil, respectively bearing date 12th June 1819 and 20th March 1820.

Queen's Bench.
[1850.]

Doe dem.
EVERS
v.
CHALLIS.

The verdict set out the said will and codicil, which will be found in *Doe dem. Evers v. Ward*, antè, p. 198, et seq. (The material part, so far as this argument is concerned, is the devise in trust for *Elizabeth Maria*, for life, and then over; commencing at p. 207 "I likewise give," and ending at p. 210 "estates and premises." The property which was the subject of this part of the devise comprehended that for which the present action was brought).

The verdict then stated the following facts.

The said *Thomas Dolley* died seised of the premises in the will and in the declaration mentioned, on 26th March 1821, without altering or revoking the said will and codicil, or either of them. At the time of the execution of his will and codicil, and at the time of his death, the said *Thomas Dolley* had one son, the said *John Dolley* (mentioned in the will), and a daughter, the said *Ann Dolley* (mentioned in the will), and another daughter, the said *Elizabeth Maria* (mentioned in the will), and another daughter, the said *Sarah Ward* (mentioned in the will), and a daughter named *Margaret Creswell*, who was married to *White*, and died in 1834.

There had been another son besides the said *John Dolley*; but such other son, whose name was *Thomas*, was dead before the date of the will. He died unmarried.

On 25th June 1806, *John Dolley* intermarried with *Mary Ann Carr*.

Volume XVIII.
[1850.]

Doe dem.
EVERS
v.
CHALLIS.

On 18th *August* 1838, *Elizabeth Maria Dolley*, having married *Joseph Doxsey*, died, never having had a child.

On 31st *March* 1847, *Ann Dolley*, having intermarried with *Isaac Akerman*, died, never having had a child.

On 27th *February* 1830, *Sarah Ward* died, leaving seven children, namely three sons and four daughters, all born before the death of the testator (the names were stated).

On 31st *January* 1809, *Mary Ann Dolley*, one of the lessors of the plaintiff, the child of *John Dolley*, was born, and is still living. *John Dolley* had two daughters living at the time of the death of the testator, and who were also alive at the death of *Ann Dolley*, namely *Mary Ann Dolley*, one of the lessors of the plaintiff, born as aforesaid, and *Elizabeth Sarah*, born 25th *December* 1820, afterwards married to *George Huddleston*. *John Dolley* had also a daughter named *Clarissa*: she was born after the death of the testator, and died an infant, that is to say, a year after her birth.

On the 21st *December* 1834, the said *Mary Ann Dolley*, one of the lessors of the plaintiff, married *Thomas Henry Evers*, one of the lessors of the plaintiff.

John Dolley mentioned in the will was and is the eldest son of the said testator, and the heir at law of the said testator. He is still living.

The verdict then set out a deed under which the defendant claimed through *John Dolley*, the heir at law.

The case was argued in *Michaelmas Term*, 1850 (a), by *Malins* for the plaintiff and *Peacock* for the defendant.

It is not thought necessary to report the argument in this Court. It will be sufficient to refer to the

(a) November 19th. Before Lord *Campbell C. J.*, *Coleridge*, *Wightman* and *Erle Js.*

*judgments of this Court and the Exchequer Chamber, Queen's Bench.
and the argument in the latter Court (post, p. 232).*

Cur. adv. vult.

[1850.]

Doe dem.

EVERS

v.

CHALLIS.

Lord CAMPBELL C. J., in the vacation following (*December 6th, 1850*), delivered the judgment of the Court.

On this special verdict we are of opinion that the lessors of the plaintiff are entitled to our judgment.

First, we have to examine their claim to one twelfth of the freehold property contained in the devise to *Elizabeth Maria Dolley*. This depends upon the limitation over, in case all the children of *Elizabeth Maria* should die under the ages specified, or if she had none. If valid, in the events which have happened this would vest one third in *Ann Dolley*, and, on her death, the twelfth claimed in Mrs. *Evers* (*late Mary Ann Dolley*), one of the lessors of the plaintiff.

On the part of the defendant, who claims under the eldest son and heir at law of the testator, it is first contended that the limitation is void because it could only take effect by way of executory devise, and that the executory devise would be bad as being too remote. If *Elizabeth Maria* had died leaving children, this objection would have been fatal; for upon her death the property would have vested in them as tenants in common in fee, according to the decision of this Court upon this very will in *Doe dem. Dolley v. Ward* (a). The subsequent limitation, therefore, could only have taken effect by way of executory devise: and, as the gift over was upon the death of the children of *Elizabeth Maria*, if a son

(a) 9 A. & E. 582.

Volume XVIII. or sons, under the age of twenty three, or, if a daughter
 [1850.] or daughters, under the age of twenty one, this would have been contrary to the rules against perpetuities, and void. But, in the event which happened, the contingent remainder to the children of *Elizabeth Maria* never took effect, she never having had a child. And the question is whether, in this event, the subsequent limitation may not take effect as a contingent remainder, supported by the life estate of *Elizabeth Maria*, and vesting immediately on the determination of that life estate.

Although, where a fee is given by a vested limitation, a remainder upon it must be an executory devise, and, if it be too remote, this and all subsequent remainders are void, if a fee be limited in contingency and the estate is given over upon a contingency devesting the fee, if the fee so limited never vests, the gift over takes effect as a contingent remainder. "It may happen, that an estate may be devised over in either of two events; and that in one event the devise may operate as a contingent remainder, in the other as an executory devise." This is the language of *Bayley J.* in *Doe dem. Herbert v. Selby (a)*, a case which seems to us to govern the present. There the testator devised freehold property to his son *George* for life, and, "after his decease," "unto all and every the child and children of my said son *George*," "and their heirs for ever, to hold as tenants in common." "But if my said son *George* should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty one years, or without lawful issue; then I give and devise the same estates unto my said son *Thomas*, my daughter *Ann Southern*, and

my son in law, William Duke, and their heirs for ever, to hold as tenants in common." Now, if *George* had died leaving children, the fee would immediately have vested in them, and the limitation over to *Thomas, Ann* and *William Duke* could only have taken effect as an executory devise. But the Court of King's Bench clearly held that, as *George* died without having had a child, the limitation over was to be construed a contingent remainder. The question arose from *George* in his lifetime having suffered a recovery. In the event which happened, if the limitation in favour of *Thomas, Ann* and *William Duke* was to be taken as a contingent remainder, it was barred by the recovery; but if as an executory devise, it was not. *Bayley* J., presiding here in the absence of Lord Chief Justice *Abbott*, said: "If *George* had left a child, a determinable fee would have vested in that child, and then the devise over could only have operated as an executory devise. But *George* having died without having had a child, the first fee never vested, and the remainder over continued a contingent remainder." *Holroyd* J. and *Littledale* J. fully concurred. And the consequence followed, that the remainder over to *Thomas, Ann* and *William Duke*, continuing to be a contingent remainder, was barred by the recovery, which, destroying the particular estate, left it without support. It has been remarked that in *Doe dem. Herbert v. Selby* (a), instead of saying the limitation was a contingent remainder in one event and an executory devise in the other, it would be more accurate to say there were two alternative remainders in fee, one of which was contingent and was subject to an

(a) 2 B. & C. 926.

Queen's Bench.
[1850.]Doe dem.
EVERS
v.
CHALLIS.

Volume XVIII. executory limitation in favour of the same person wh
[1850.] would have been the object of the alternate remainde

Doe dem.
EVANS
v.
CHALLIS.

But, whatever may be the technical language in whic
the limitations should be described, it was decided tha
if the first contingent remainder never vested, the
second limitation would take effect as a conting
remainder. This decision, which is founded on pri
authorities, and has never been questioned, seems to
quite sufficient to shew that, in construing the will
Thomas Dolley, the limitation of the property left
Elizabeth Maria, after her children, is to be consider
as taking effect as a contingent remainder.

Another objection made was upon the language
the remainder over, "unto the child or children of x
said son and two daughters," which is only, in 'expr
words, "in case of the death of my said son or either o
my said two daughters without leaving a child, if a son
that shall live to attain the age of twenty three years, or
if a daughter, who shall live to attain the age of twent
one years," without saying, with respect to his daughte
Ann Dolley, "if she has none:" the argument being
that, as *Ann* never had a child, the contingency has no
arisen on which her share was devised to the children of
John Dolley. But we consider it quite clear, from th
testator's language, that he intended this remainder t
take effect upon his daughter *Ann* having no children
in like manner as upon her having children and dyin
without leaving children who should live to the require
age. There is a long string of cases to support th
doctrine that, if there be a gift over on a class dyin
within a particular age, it takes effect if that class nev
comes into existence. I consider it sufficient to men
tion the first of them, which has been often acted upo

Jones v. Westcomb (*a*), where a testator bequeathed a *term of years* to his wife for life, and, after her death, to the child she was then *enceinte* with, and, if such child should die before the age of twenty one, then one third to his wife and the other two thirds to other persons. The wife was not *enceinte*. But Lord *Harcourt*, and afterwards the Court of King's Bench (*b*), held that the bequests over took effect.

*Queen's Bench.
[1850.]*

Doe dem.
EVERS
v.
CHALLIS.

The lessors of the plaintiff likewise claiming one twelfth of the freehold property devised by the testator to his daughter *Ann Dolley*, it was admitted that this claim was not liable to any objection which was not urged against the former. And, therefore, our judgment will be in favour of the lessors of the plaintiff for both the twelfths which are claimed.

Judgment for plaintiff.

(*a*) 1 *Eg. Ca. Ab.* 245.

(*b*) *Gulliver v. Wickett*, 1 *Wils.* 105.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

CHALLIS against Doe, on the several demises of THOMAS HENRY EVERES and MARY ANN his wife, of the said T. H. EVERES, and of others.

ERROR was brought on the above judgment in the Exchequer Chamber. The case was argued in last Michaelmas Vacation (*a*). For marginal note, see p. 224, ante.

(*a*) November 27, 1851. Before *Mawle, Cresswell, Williams and Talfourd* Js., and *Platt and Martin* Ba. *Cresswell* J. and *Martin* B. left the Court at the close of the argument for the defendant in error.

Volume XVIII. *Rolt*, for the plaintiff in error (defendant below).
 1852.

CHALLIS
 v.
Doe dem.
EVERS.

The case for the plaintiff below, as to *Ann's* share of the property devised to *Elizabeth Maria*, is that, upon the death of *Elizabeth Maria* without issue, her brother *John* and her sisters *Sarah* and *Ann* took each one third of the whole for life: and that, upon *Ann's* death without issue, the two children of *John* took between them one half of *Ann's* third, that is, one twelfth each. And this claim rests upon the assumption that the limitation over, in case of the death of the son or either of the daughters, one of whom is *Ann*, without leaving a son who should attain the age of twenty three years, or a daughter who should attain the age of twenty one, can take effect within the legal restrictions as to remoteness.

The defendant below contends that, as *Elizabeth* had no child living at the death of the devisor, and as the limitation might not take effect for twenty three years if she had a son, it reaches beyond any life in being after twenty one years after the expiration of such life; and therefore, if the limitation can take effect only as an executory devise, it is bad. But, for the plaintiff below, it is answered that the limitation may take effect as contingent remainder, and that therefore the objection as to remoteness does not arise. In support of this argument, reliance is placed on *Cole v. Sewell* (*a*).

First: the limitation in question is not a contingent remainder, but an executory devise. Another clause in this will was the subject of the decision in *Doe dem. Dolley v. Ward* (*b*). There land was devised, after the decease of *Sarah Ward*, "unto such of her children as

(a) 2 *H. L. Ca.* 186. Affirming the decree of the Lord Chancellor of Ireland, in *Cole v. Sewell*, 4 *Drury & Warren*, 1.

(b) 9 *A. & E.* 582. See pp. 201—204, ante.

she now has or may have, if a son or sons, at his or their age or ages of twenty three years, and, if a daughter or daughters, at her or their age or ages of twenty one years, their respective heirs, executors, administrators, and assigns, according to the nature thereof, as tenants in common: and, in case of the death of any child or children of her my said daughter, if a son or sons, under the age of twenty three years, and a daughter or daughters, under the age of twenty one years, the share or shares of each such child, son or daughter, so dying, to go to the survivors and survivor of such child and children, being a son or sons, on his or their attaining the said age of twenty three years, and, if a daughter or daughters, on her or their attaining the age of twenty one years, and their heirs, executors, administrators, and assigns, in equal shares, as tenants in common." The question arose, whether the first limitation gave estates which could vest only on the son or daughter attaining the ages named, or whether the estate vested immediately on the birth of the child, but the possession was postponed. On the former construction, the limitation would have been void, as an executory devise which might not take effect till the expiration of twenty three years from the death of the tenant for life: on the latter, that objection would not arise. The latter view prevailed; and it was held that the estate in fee vested immediately on the birth of the child, the remainder being contingent till then. Now that decision shews that, in the present case, the limitation to the children of *Elizabeth Maria* was a contingent remainder in fee, which would become a vested fee on the birth of a child. The limitation over, therefore, acts by way of cutting down a fee, and is an executory devise. It is not the

Queen's Bench.
1852.

CHALLIS
v.
Doe dem.
EVERS.

Volume XVIII. case of a contingent remainder with a double aspect.
1852.

CHALLIS

v.

Doe dem.
EVANS.

One event only is named, the death of the tenant for life without leaving a son or daughter who should attain the age specified. This distinguishes the case from one which is relied upon on behalf of the plaintiff below, *Doe dem. Herbert v. Selby* (*a*). There the devise was to *G.* for life, remainder to his children in fee as tenants in common: but, if *G.* should die without issue, "or" leaving issue and such children should die before attaining the age of twenty one or without lawful issue, then over. *G.* died leaving no issue. No question arose as to remoteness: but *G.* had suffered a recovery, which would defeat contingent remainders but not executory devises: and it was held that the limitation over created a contingent remainder with a double aspect, and was defeated by the recovery. Had the event only of the children dying before attaining the ages been mentioned, there would have simply been a limitation of a remainder in fee and an executory devise superseding the fee upon a particular event. *Luddington v. Kime* (*b*) and *Crump dem. Woolley v. Norwood* (*c*) are to be explained similarly. It is true that a person who dies leaving no issue at all does die without leaving either son or daughter who attains the specified age. But that mode of the realization of the event is not pointed at in the limitation. *Gulliver v. Wickett* (*d*) was referred to in the argument below. In that case, there was a devise to the devisor's wife for life, and, after her death, to a child of which she was supposed to be enceinte in fee: and, if the child should die before the age of twenty one without issue, then over. The wife was not enceinte in

(*a*) 2 *B. & C.* 926.

(*b*) 1 *Ld. Raym.* 203. *S. C.* 3 *Lev.* 431

(*c*) 7 *Tenn.* 362.

(*d*) 1 *Wils.* 105.

~~Fact.~~ There was no question as to remoteness: but it was held that the limitation over took effect; for that the birth of the child was not a condition precedent, but the limitation to it created a remainder. The reporter, in a note, expresses a doubt, whether the limitation over was considered a contingent remainder or an executory devise: *Fearne, Cont. Rem.* 396., shews that it was treated as an executory devise, and that it would have been void ab initio as a contingent remainder. If, therefore, the age named had been twenty three instead of twenty one, the limitation would have been bad for remoteness. But then it would have been precisely the case now before the Court.

Queen's Bench.
1852.

CHALLIS
v.
Doe dem.
EVANS.

Supposing this to be a contingent remainder, it is argued that *Cole v. Sewell* (*a*) shews that the objection as to remoteness cannot arise. It is true that Lord Brougham does there say that, inasmuch as a contingent remainder must take effect, if at all, on the termination of the particular estate, the protection afforded by the rule against remoteness is unnecessary. Some surprise was created in the profession by that language; for it was conceived that to limit land to the unborn sons of unborn sons violated the law against remoteness, whether this was done by way of executory devise or by way of contingent remainder. But this answer to the objection for remoteness can apply only where the preceding estate is an estate tail, as it was in *Cole v. Sewell* (*a*), not where, as here, it is a fee. This is pointed out by Mr. Jarman (*On Wills*, vol. 2. p. 732.) in his remarks on the language of Lord Chancellor Sugden, in the Irish Court of Chancery (*b*): and Sir Edward Sugden,

(a) 2 H. L. Ca. 186.

(b) *Cole v. Sewell*, 4 Dr. & War. 28.

Volume XVIII. remarking (in his *Treatise of the Law of Property, as Administered by the House of Lords*, p. 120) upon Mr. Jarman's observations, appears to assent to this restriction of the doctrine.

CHALLIS
v.
Doe dem.
EVERS.

The Court below seems to have assumed that the character of the limitation may be determined by the event. But the limitation cannot be supported unless it was valid upon every mode of the occurrence of the event which was possible at the time of the will first coming into operation, that is, at the death of the devisor. In this respect, the rule is the same as to realty and personalty. Before determining whether the limitation takes effect as a contingent remainder or an executory devise, it must appear that it is a valid limitation, which must be determined before the events have taken place. And this is so, whether the vice of the limitation be in the description of the event or in that of the class which is to take, as where it is expectant upon the failure of a class which may not fail within the legal time, or where it is to a class which may possibly not come into existence within such time. *Jee v. Audley* (a) is an instance of the application of this rule, as to the failure of a class, to personalty: and there Sir L. Kenyon M. R. said that the question was, not whether the limitation was good in the events which had happened, but whether it was good in its creation. *Leake v. Robinson* (b) was a similar case, including both realty and personalty; and there Sir W. Grant M. R. upheld the doctrine in *Jee v. Audley* (a). The rule as to classes and as to events must be the same.

In *Leake v. Robinson* (b) the Master of the Rolls

(a) 1 *Cox, Ca. Ch.* 324.

(b) 2 *Meriv.* 363.

refused to split a bequest to a class into bequests to different subdivisions of the same class (*a*): and that case is so far an authority against the attempt here made to turn the executory devise into an alternative contingent remainder by subdividing the one event named into two modes in which it might occur. In *Bull v. Pritchard* (*b*) two events were actually named: there being no children of a person then living, or there being children who should all die under twenty three: and it was held, by Lord Gifford M.R., that a limitation expectant upon the happening of either of these events was too remote. The property there in question was leasehold. Afterwards, the same devise was brought under the consideration of *Wigram V. C.*, with respect to realty, in *Bull v. Pritchard* (*c*); and he also held the limitation over bad for remoteness. It is true that no attempt was there made to construe the limitation as an alternative contingent remainder. [*Williams J.* I believe Lord Gifford's decision has been questioned (*d*).] In *Newman v. Newman* (*e*) the devise was to all the children of four existing persons who should attain the age of twenty four. There were children of the four at the devisor's death; but none were born after: the devise was held to be void for remoteness. In *Proctor v. Bishop of Bath and Wells* (*f*) an advowson was devised to the first or other son of *P.*, a living person, that should be bred a clergyman and be in holy orders; and, if *P.* should have

Queen's Bench.
1852.

CHALLIS
v.
Doe dem.
EVERS.

(*a*) 2 *Mari.* 390.

(*b*) 1 *Russ.* 213.

(*c*) 5 *Hare.* 567.

(*d*) See *Bland v. Williams*, 3 *Myl. & K.* 411; *Doe dem. Dolley v. Ward*, 9 *A. & E.* 605.

(*e*) 10 *Sim.* 51.

(*f*) 2 *H. Bl.* 368.

Volume XVIII. no such son, then over: *P.* died without having any son at all: but the limitation over was held void for remoteness. Yet there it might have been said, as well as it can be said here, that the event of *P.* dying without leaving any son at all was one event upon which a good limitation might be expectant.

CHALLIS
v.
Doe dem.
EVANS.

In the Court below the distinction seems to have been lost sight of between the questions whether limitation is valid, and how a limitation, if valid is to be applied. The former is the question here. But, in cases raising the latter question, it may be that the complex event will be considered as involving several alternative events; so that, for instance, if land given to *A.*'s son on his attaining twenty one, and, if son of *A.* attain twenty one, then over, that the limitation over may take effect if *A.* has no son at all. The limitation is there good from the first; but it will be applicable according to the event. But the event cannot determine whether the limitation be valid: that must be ascertained, one way or the other, the moment the will comes into operation. Thus, under the old law, a limitation expectant upon the death of *A.* without issue inasmuch as this was construed to mean the failure of *A.*'s issue at any time, was too remote: and it was not made good by *A.* dying without issue. And it was with the view of partially remedying this that, by stat. 7 W. & 1 Vict. c. 26. s. 29., it was enacted that such limitation, unless a contrary intention should appear (as there described), should be construed to mean a failure of issue in the lifetime or at the death of the party named.

Further, those cases are inapplicable where two con-

tingencies are expressly named, upon one of which only a valid limitation can be expectant, and the construction is as if such one only had been named. *Longhead dem. Hopkins v. Phelps* (*a*) is such a case. There, if the event occur upon which the limitation may be well limited, the limitation takes effect, because it was so far valid from the very first.

Queen's Bench.
1852.

CHALLIS
v.
Doe dem.
EVERS.

Malins, contrà. It is true that the limitation cannot be construed by the event: the event shews only who is to take.

It is an established rule that, wherever a limitation, which would be bad as an executory devise, can be supported as a contingent remainder, this construction shall be adopted. That rule was recognised in *Cole v. Sewell* (*b*). If an estate were limited for life to an unborn son, and afterwards to his son, the last limitation would be bad, because it might not take effect within twenty one years after lives in being. But, if the remoter limitation were immediately expectant upon an estate tail, it would be construed as a contingent remainder, and be valid, since the tenant in tail might dispose of the whole estate: and so it would be if the limitation were expectant upon a series of lives all in existence; for then the limitation might be defeated by the destruction of the life estate. The attempt to restrict this rule failed in *Cole v. Sewell* (*b*): and the language of Sir Edward Sugden in that case, in the Court below, is very strong (*c*). The limitation over, by which the lessors of the plaintiff here claim, is substantially the

(*a*) 2 W. Bl. 704. See judgment in *Crump dem. Woolley v. Norwood*, Tern. 372. *Goring v. Howard*, 16 Sim. 395.

(*b*) 2 H. L. Ca. 186.

(*c*) 4 Dr. & War. 28.

Volume XVIII. same as that in *Doe dem. Dolley v. Ward* (*a*). There, in the event, the remainder to the children of *Sarah* was vested: here the remainder to *Ann's* children, having been contingent up to her death, fails: if she had left children, they would have taken a vested interest. The limitation depends upon a contingency with a double aspect, as in *Luddington v. Kime* (*b*); here, as there, one of the contingencies must be determined on the expiration of a life in being. The point was in fact decided in *Doe dem. Herbert v. Selby* (*c*). It is true that nothing there turned on the question of remoteness; but it was decided that a recovery by the tenant for life barred the limitation over: which shews that here *Ann*, by suffering recovery, might have defeated the estates limited over. *Carwardine v. Carwardine* (*d*) is an instance of construing a limitation as a contingent remainder rather than a springing use. In *Gulliver v. Wickett* (*e*) the devise to the supposed child created a vested estate, because a child of the devisor would be living either at the devisor's death or within the period of gestation: the limitation over was therefore an executory devise: that principle is inapplicable here. In *Festing v. Allen* (*f*) land was devised to *M.*, "and from and after her decease, to the use of all and every the child or children of her" "who shall attain the age of twenty one years:" *M.* died, leaving children all infants: it was held that the devise to her children was a contingent remainder, which failed by reason of the failure of the particular estate.

(*a*) 9 *A. & E.* 582.

(*b*) 1 *Ld. Raym.* 203. S. C. 3 *Lev.* 431.

(*c*) 2 *B. & C.* 926.

(*d*) *Fearne, Cont. Rem.* 388. S. C. 1 *Eden's Ch. Ca.* 27.

(*e*) 1 *Wils.* 105.

(*f*) 12 *M. & W.* 279.

before such remainder could vest. The Court there acted in conformity with *Russel v. Buchanan* (*a*). In *Bull v. Pritchard* (*b*) it seems to have escaped notice that the limitation might be supported as a contingent remainder: the point was not made. In *Proctor v. Bishop of Bath and Wells* (*c*) the limitation was necessarily construed as an executory devise, there being no particular estate which could have supported a contingent remainder.

Queen's Bench.
1852.

CHALLIS
v.
Doe dem.
EVEES.

But here it is suggested that the complex event of ~~Ana~~ leaving no children who should attain the specified ages cannot be considered as comprehending the two events; dying without leaving children, and leaving children who should all die within the specified ages. The events, however, are distinctly designated in the preceding limitation to *Elizabeth Maria* and her children: it is very improbable that the testator meant to make different dispositions in the two cases. In *Murray v. Jones* (*d*) a gift was limited upon the event of the testatrix having but one child living at the time of her death: and Sir W. Grant M. R. held that this comprehended the event of the testatrix dying childless. A similar doctrine may be collected from *Fearne, Cont. R.* 510., *Jones v. Westcomb* (*e*), *Mackinnon v. Sewell* (*g*), *Wilson v. Mount* (*h*), *Meadows v. Parry* (*i*). [Maule J. Cases are wanting in which the exact form of words has

(*a*) 2 Cr. & M. 561. S. C. 4 *Tyrwh.* 384.

(*c*) 2 H. Bl. 358.

(*b*) 5 *Hare*, 567.

(*e*) 1 *Eq. Ca. Abr.* 245.

(*d*) 3 *Ves. & B.* 313.

(*g*) 5 *Sim.* 78, before *Shadwell V. C.*; 2 *Myl. & K.* 202, before Lord *Brougham C.*

(*h*) 2 *Bass.* 397.

(*i*) 1 *Ves. & B.* 124.

Volume XVII. determined the interpretation of the devise. *William 1852.* referred to *Doe dem. Blakiston v. Haslewood (a.)*]

CHALLIS
v.
Doe dem.
EVERS.

It is true that, as was decided in *Leake v. Robinson* (b) if there be a devise to a class, comprehending some who cannot take, the gift cannot be divided into two classes, one capable and the other incapable. But the limitation here contemplates two distinct events, that there should be no children, or that there should be children taken up vested interests afterwards defeated.

Cases respecting bequests of personality cannot safely be applied to the determination of this question. The rule as to remoteness is not there qualified by the possibility of defeating a limitation, however remote which may take effect as a contingent remainder. *J. v. Audley (c)* and *Newman v. Newman (d)* were cases of personality.

Rolt, in reply. It is impossible to select in this limitation any words upon striking out which there will be left a limitation upon the event of *Ann* dying without children. The cases which have been cited, in which events not named have been introduced in order fully to express a presumed intention of a testator, are dangerous precedents: a safer principle was acted upon in *Doe dem. Blakiston v. Haslewood (a)*, where *White v. Barber (e)* was overruled. [*Maule J.* referred to *Monger penny v. Dering (g.)*.] It will, however, be found that these cases were instances of applying of a limitation

(a) 10 Com. B. 544.

(b) 2 Meriv. 363, 390.

(c) 1 Cox, Ca. Ch. 324.

(d) 10 Sim. 51.

(e) 5 Burr. 2703.

(g) 2 De G. Macn. & G. 145; 7 Hare, 568; 16 M. & W. 418; 9 Com. B. 700.

valid in itself, not of modifying one which was void for remoteness. [Platt B. Where was the remainder at the time of the death of *Ann*?] Up to the time of her death, there was a contingent remainder to her possible children; on her death without children this failed; and, there being no limitation expectant on the event of her so dying, the limitation to her brother's children was expectant upon limitations which are admitted to be bad for remoteness.

Queen's Bench.
1852.

CHALLIS
v.
Doe dem.
EVERS.

The rule as to inferring contingent remainders has been stated rather too strongly on the other side. Instead of saying that, where a limitation can be construed as a contingent remainder, it must be so construed, it would seem more correct to say that, if either construction be equally obvious, and there be a good particular estate, the limitation will be construed as a contingent remainder. But, when in a given event which may happen it must be an executory devise, the rule does not apply.

Cur. adv. vult.

ALDERSON B., in this vacation (*February 2d*), delivered the judgment of the Court.

This is a writ of error upon the judgment of the Court of Queen's Bench upon a special verdict.

This was an action of ejectment, brought to recover one twelfth part of certain property devised by the will of one *Thomas Dolley* to his daughter *Elizabeth*. The lessors of the plaintiff were *Mary Ann Evers* and her husband, she being one of two children of *John Dolley*, the son of the testator.

The testator had four children, *John*, *Sarah*, *Ann* and *Elizabeth*: and, by his will, dated 12th June 1819, he

Volume XVIII. gave the property (the one twelfth of which is now in question) to trustees during the life of his daughter *Elizabeth*, in trust for her separate use, and, after her decease, he gave the same to such children as she might have, if a son or sons, who should live to the age of twenty three years, and, if a daughter or daughters, who should live to the age of twenty one years, their heirs and assigns, as tenants in common. He then provided for the disposition of the property in the event of one or more of the children of *Elizabeth* dying, leaving others or another surviving. He then proceeded thus: "In case all the children of my said daughter *Elizabeth Maria* shall die, if a son or sons, under the age of twenty three years, or, if a daughter, under the age of twenty one years, *or if she has none*," I give the said property &c. unto the said trustees, during the respective lives of my son *John* and my daughters *Sarah Ward* and *Ann Dolley*, upon trust for the use of *John*, and the separate uses of *Sarah* and *Ann*, during their lives, in equal shares; "and, upon the decease of my said son and two last named daughters, I give the share of such of them so dying unto his or her children, if a son or sons, living to attain the age of twenty three years, and, if a daughter or daughters, living to the age of twenty one years, his, her and their heirs, executors, administrators and assigns;" if more than one, as tenants in common. "And" (the part of the devise upon which the question depends), "in case of the death of my said son or either of my said two daughters without leaving a child, if a son, who shall live to attain the age of twenty three years, or, if a daughter, who shall live to attain the age of twenty one years, I give the part and parts such children one child would be entitled to as aforesaid unto the child or

CHALLIS
v.
Doe dem.
EVERS.

children of my said son and two daughters having issue, if a son or sons, living to the age of twenty three years, and, if a daughter or daughters, living to attain the age of twenty one years: if two of my said last named children have such children or child, to them, his or her heirs, executors, administrators and assigns, as taking in equal shares from his or her father or mother, his, her and their heirs, executors, administrators and assigns."

Queen's Bench.
1852.

CHALLIS
v.
Doe dem.
EVERS.

Elizabeth died in *August* 1838, having been married, but never having had a child. Upon her death, her brother and two sisters took each one third of the property devised to her as above. In *March* 1847 *Ann died*, having been married, but also never having had a child. And thereupon Mrs. *Evers*, being one of two children of *John*, and being twenty one years of age, claimed one twelfth of the property devised to *Elizabeth*, insisting that, upon the event which had happened, the two children of *John* became entitled to half of the one third of the property devised to *Elizabeth* which had come to *Ann* upon her death, and that she, as one of them, was entitled to the half of this half, or one twelfth of the whole.

A special verdict was found, which stated the above facts: and judgment was given by the Court of Queen's Bench for the lessors of the plaintiff. And upon this judgment the present writ of error is brought.

This will came under the consideration of the Court of Queen's Bench in the case of *Doe dem. Dolley v. Ward*(a): and both parties acquiesce, and, as we think, most correctly, in the propriety of that decision.

We are to take it, therefore, as clearly established that by this will the testator gave an estate for life to his

(a) 9 A. & E. 582.

Volume XVIII. daughter *Elizabeth*, with a contingent remainder in fee
1852.

CHALLIS
v.
Doe dem.
EVERS.

to her unborn children, which, on the birth of a child, became a vested remainder in fee; and that, upon such child or children being born, but failing, if male, to attain twenty three, and, if female, twenty one, then he gave *Elizabeth's* share over by an executory devise to his other three children equally. Now it is clear that this executory devise over would be void as too remote. But in this part of his will the testator also provided, by a distinct and separate clause, that, if *Elizabeth* should have no children, the property devised to her should go over in like manner to his three remaining children. Now in that event (which happened) the contingent remainder to *Elizabeth's* children never vested; and so the devise over took effect, not as an executory devise, but as a good contingent remainder to the three other children of the testator, one of whom was the testator's daughter *Ann*.

In the event therefore which has happened, the devise was one to *Elizabeth* for life, contingent remainder to her unborn issue (which failed), contingent remainder, as to one third, to *Ann* for life, with a contingent remainder in fee to *Ann's* unborn issue, to become vested on the birth of a child, and with the devise over (on which the present question turns) in favour of the children of her surviving brother *John* and sister *Sarah*. Now *Ann* died never having had a child; and consequently, the contingent remainder in fee given to her children failed.

We must look therefore at the terms of the devise over.

They are as follows: "In case of the death of my said son or either of my said two daughters without leaving a child, if a son, who shall live to attain the age of twenty

or, if a daughter, who shall attain the age of years, I give the part and parts *such children* *old be entitled to as aforesaid* unto the child or my said son and two daughters *having issue*, sons, living to the age of twenty three years, daughter or daughters, living to attain the age one years; if two of my said last named have such children or child," &c.

re there are not the two events which were and distinctly mentioned in the former devise event, if she shall have no children, is not in terms at all.

estion between the parties is, whether this r be void or not. It may be well admitted stator intended to include in these words two st, the event of *Ann* having no child at all; lly, if she never had a child, she must die wing a son who could attain twenty three or who could attain twenty one; but, secondly, tended to include in these same words the event of her having a child and that child er the prescribed age. This second event is, to all the cases, too remote an event to take ording to law. The first, if it stood alone, is e thing to be settled is the principle upon Court is to act.

irst place, it seems established that the time to he will is at the testator's death. The devise gal at that time, to oust the heir at law. Now,

Queen's Bench.
1852.

CHALLIS
v.
Doe dem.
EVANS.

Volume XVIII. originally, would have been valid: but it ought to be shewn that the devise of the testator must be valid and legal in all the events contemplated by him.

CHALLIS
v.
Doe dem.
EVERS.

This, we think, is the principle contained in the passage of Sir *W. Grant's* judgment in *Leake v. Robinson* (*a*), in which he says: "Executory devise is itself an infringement on the rules of the common law, and allowed only on condition of its not exceeding certain established limits." In a devise to a class, therefore, the Courts do not split the devise into its parts and give effect to the legal part of it. For this, says Sir *W. Grant*, is to make a will for the testator. He says: "I give my property to the whole of this class." It may be that the persons to whom he is not permitted by law to give it are the very persons in favour of whom he includes the whole class in his bounty: and therefore, splitting the devise into its parts, you may perhaps violate his will, even as to those to whom you give it. If he separates the devises himself, it is not so. Hence the meaning, and the true meaning, of this clause is, *I give every event* which can happen in which *Ann* dies leaving no child who if male attains twenty three or if female twenty one, I give the estate over. That is what he says, and what he means. He includes all these events in one class. Some are legal, some illegal. How is the Court to separate these events, which the testator has expressly joined together, without making a will for him?

The principle, therefore, seems to be against splitting such a devise when we are considering the question whether it is a legal one. Now this question, it is conceded, must be determined as on reading the will at the time of the testator's death.

instant of the testator's death. Do the cases cited affect this principle?

*Queen's Ben
1852.*

On looking at them, we find that in all of them the devise in any event was legal, and that it was competent to the testator to make it. In *Jones v. Westcomb* (*a*), the case on which the Court of Queen's Bench proceeded, this was so. That was a bequest to the wife for life, and, after her death, to the child with which she was supposed enceinte, and, if such child should die before twenty one, then, as to one third, to his wife, and two thirds to other persons: and it was held, the wife not being enceinte, that the bequest over took effect. But, if the testator had distinctly expressed all that the Court held to be included in the words he used, the whole would have been still legal. This is not an authority, therefore, for splitting a devise and giving effect to the legal, rejecting altogether the illegal part of it. *Gulliver v. Wickett* (*b*), which is in truth the same case, only applying the will to real estate, is to the same effect. And the observations of the Court in this latter case, as to the validity of the executory devise over, if it took effect as an executory devise, were material if this necessity for the devise being legal in all the contingencies contemplated by the testator be the true principle on which the Court acts, and may reconcile the observations of Mr. Fearne (*Cont. R.* p. 396) with those of *Bayley J.* in *Doe dem. Harris v. Howell* (*c*). *Meadows v. Parry* (*d*) is to the same effect. These cases are fully explained and put on a very clear principle by Sir *W. Grant* in *Murray v. Jones* (*e*). They shew, no doubt, that the existence

*CHALLIS
v.
Doe dem.
EVERS.*

(*a*) 1 *Eg. Ca. Abr.* 245.

(*b*) 1 *Wils.* 105.

(*c*) 10 *B. & C.* 191. 200.

(*d*) 1 *Fes. & B.* 124.

(*e*) 3 *Ves. & B.* 319.

Volume XVIII. and failure of the children to whom the provision
1852. limited is made is not in all cases, and was not in these

CHALLIS
v.
Doe dem
EVERS.

cases, a condition precedent to the devise over. But they shew no more, and do not at all apply to the question now before the Court, whether, if one of the contingencies be illegal, the single devise which includes that contingency with others becomes void. If Lady *Bath* had separately stated in her will the two contingencies, in either of which Mrs. *Markham* was to take each would have been legal; and the Court held that her including them in one expression made no difference. It is like expressing the individuals of a class, all of whom can legally take, and including all those individuals in a class which is good. But the reverse is true if some of the individuals cannot legally take. There, if expressly named, the will is carried partly into effect. If classed, it is void altogether.

Suppose that this had been the limitation in a deed: To *Ann* for life, remainder to her children in fee, and, if she have none who, if a male, attains twenty three, or, if a female, attains twenty one, then over: it is, we apprehend, clear enough that such a limitation over would be void altogether at the common law. It may however, says Mr. *Fearne* (*Cont. R.* p. 373), be good in a will, or by way of use, upon a contingency to happen within a reasonable period. Now, if so, must the contingency here so happen? We think not: for it may go beyond the time allowed by law, if the natural and full effect be given to the words of the testator.

For these reasons, we think that the judgment of the Queen's Bench must be reversed.

Judgment reversed

CASES

Queen's Bench.
1852.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

EASTER TERM,

XV. VICTORIA. *

The Judges who usually sat in Banc in this Term
were:

Lord CAMPBELL C. J.	ERLE J.
WIGHTMAN J.	CROMPTON J.

The following rule was read in Court, April 27th.

In the Queen's Bench.

Easter Term, 15 Victoria, 1852.

REGULA GENERALIS. It is ordered that, whenever a defendant shall be required by law and the practice of this Court to give recognizance to appear and answer to any indictment found in this Court, or removed or to be removed into the same, it shall be added to the condition of every such recognizance That the defendant shall personally appear from day to day on the trial of such indictment, and not depart until he shall be discharged by the Court before whom such trial shall be had: Unless the Court, or a Judge, shall think fit to dispense with such additional condition.

By the Court.

Thursday,
April 15th.

LANE against HILL.

A plaintiff cannot recover on an account stated without shewing some item, to a specific amount, agreed upon as due; though a single item would be sufficient.

Plaintiff, to prove an account stated, gave in evidence a letter in which defendant wrote to plaintiff: "Oblige me by holding my cheque till

Monday, and in the interim I will send you the amount in cash." The cheque, being post-dated, could not be read as evidence; and there was no further evidence of the amount admitted by defendant to be due.

Held, by Lord Campbell C. J., *Wightman* and *Crompton* Js., That the

plaintiff could not recover even nominal damages.

By Erle J. That nominal damages might be given, the letter shewing that a sum had been arrived at in account, though the amount could not be proved.

ASSUMPSIT. 1st count on a banker's cheque *26l. 5s.*, made by defendant, and of which plaintiff was bearer. 2d count for *30l.* for money found due from defendant to plaintiff on an account between them.

Pleas. 1. That defendant did not make the cheque in manner and form &c. 2. Non assumpsit.

On the trial, before *Erle* J., at the sittings in *Mid* after last *Michaelmas* term, the plaintiff failed to prove of the cheque, it being post-dated: but, to an account stated, he put in the following letter, rec'd by him from the defendant.

"Dear Sir. I must request you to oblige by holding my cheque till *Monday*, and in the interim will send you the amount in cash. I made a mistake in dating to-day, as I did not expect to be in funds till *Fri* *Saturday*. I regret I was not in when you came &c. "John Hill."

The learned Judge was of opinion that these were some evidence of an account stated; and he directed a verdict for the plaintiff for one shilling, reserving to move for a nonsuit. *Paterson*, in the ensuing moved accordingly, and cited *Kirton v. Wood* (*a*) *Teal v. Auty* (*b*). A rule nisi was granted.

Queen's Bench.

1852.

LANE
v.
HILL.

Knowles now shewed cause. It has indeed been laid down, in *Teal v. Auty* (a) and *Kirton v. Wood* (b), that a plaintiff cannot recover on an account stated unless a definite sum has been found due; but those were cases in which substantial, and not merely nominal, damages were claimed. The letter here admits that something is due. [Lord Campbell C. J. Is it stating an account to admit, generally, that a debt is due? Erle J. If there were evidence that a balance was ascertained on a certain day, and that the defendant afterwards referred to that fact, and said, On such a day something was found due from me to you, and I will pay it, that, it seems to me, would shew an account stated, though there were no proof of the amount found due.] Giving a cheque shews some balance to be due. [Lord Campbell C. J. How could a recovery in this case be pleaded in bar to another action?] To the amount of one shilling it might. [Lord Campbell C. J. Suppose there were several actions: would it be an answer to each, as to one shilling?] The difficulty here is merely in assessing an amount of damages: but they must at least be nominal. In *Green v. Davies* (c) it was held that an acknowledgment of "some" interest being due, and a promise to bring it, was not an available admission, even to the extent of nominal damages: but the observation of Bayley J. (delivering the judgment of the Court) was: "What the defendant said as to interest was an acknowledgment that there was some debt in existence, but what was the nature of that debt, whether it was due to the plaintiff in her character of executrix" "or in her own right, and whether it was one for which assumpsit

(a) 2 Brod. & B. 99.

(b) 1 M. & Rob. 253.

(c) 4 B. & C. 235.

Volume XVIII. would lie, are questions upon which we are left entirel
1852. in the dark." Here the Court is not under the sam
LANE
v.
HILL.. difficulty.

Edwin James and Paterson, contrà. According to a
the definitions of an account stated, it must be of
specific sum. Lord Mansfield says, in *Trueman*
Hurst (a): "What is an account stated? It is an
agreement by both parties that all the articles are true.
One item may suffice; *Highmore v. Primrose* (b); but
one at least, to a given amount, must be agreed upon
and proof of the agreement given. [Lord Camp
C. J. Certainly one item will constitute an account
but it is difficult to imagine an account without an
item.] The ruling in *Kirton v. Wood* (c) is express
in point. *Tindal* C. J. says: "On an account state
you must shew some precise sum." It does not appear
that the plaintiff there would not have taken nomin
damages; and in *Teal v. Auty* (d) the plaintiff's couns
claimed to have "at least a nominal verdict." [Erle J.
Here a cheque is admitted to have been given; tha
shewed an account stated, to some amount. Suppose a
witness had heard the defendant say to the plaintiff that
there was a balance due to him, but the witness could
not swear to the amount named; would not this prove
an account stated?] Legally, there is no cheque in
existence here. In *Teal v. Auty* (d) the defendant had
been heard to admit (referring, as it seemed, to some
written memoranda) that something was due to the
plaintiff, which defendant promised to pay. The Court
however, said: "The promise to pay in the presen

(a) 1 T. R. 40.

(b) 5 M. & S. 65.

(c) 1 M. & Rob. 253.

(d) 2 Brod. & B. 99.

case was probably made with reference to the written memorandum, but that, not being stamped, could not be admitted in evidence;" and they held that the plaintiff was rightly nonsuited.

*Queen's Bench.
1852.*

LANE
v.
HILL.

Lord CAMPBELL C. J. This rule must be absolute. The general admission of a pecuniary demand, not specifying the amount, is not an account stated. I should be sorry if there could be such a discrepancy between what is alleged in pleading and what is to be proved. The general understanding of an account stated is that the parties meet, agree that so much is owing, and so end the question between them: but I cannot imagine an account stated without a single specific item. The words of the letter relied upon here do not furnish us with any item. The amount acknowledged may be one shilling or a thousand pounds. It is argued that the letter was evidence of an account having been stated; but I think it is not; at least for the purpose of entitling the plaintiff to recover on this count. It is not consistent with any of the authorities which have been referred to that there should be an account stated without one item of settled amount. It would lead to great inconvenience if even nominal damages could be given in such a case. Suppose a valid cheque had been given, but not proved: would a verdict for nominal damages, grounded on this letter, bar the plaintiff to the whole amount of the cheque? It is suggested that the bar might be pro tanto: but this would be full of inconvenience. I think, therefore, that there ought to have been a nonsuit or a verdict for the defendant.

Volume XVIII.
1852.

LANE
v.
HILL.

WIGHTMAN J. "Account stated" seems almost ~~to imply~~
at termini to imply a definite arrangement. Here the amount agreed upon may have been 1000*l.* or 50*l.* The difficulty of recovering in another action if the verdict in this were pleaded in bar appears to me as my Lord has put it. And *Kirton v. Wood* (*a*) is an authority in point.

ERLE J. I agree in the doctrine of the cases, but not in the conclusion which has been drawn from them. I think the evidence shewed that an account was stated, and a definite balance found, namely, the amount for which a cheque was drawn. That amount, whatever it might be, and the sum to be awarded as damages, are different things. The cheque may be considered as lost: but there is a letter of the defendant referring to it, and shewing that a definite sum has been found due, though the amount of it cannot now be fixed. That, I think, is a case for nominal damages. If another action were brought for any part of the demand here in question, it might be shewn by averment that the plaintiff had recovered in this cause upon the same ground of action, and to what extent.

CROMPTON J. My impression is that a plaintiff cannot recover on an account stated unless he can shew a precise sum agreed upon as due; and therefore that the plaintiff here cannot succeed.

Rule absolute.

*Queen's Bench.
1852.*

ANNE MEREDITH, administratrix of MARY
TURNER, against RICHARD GITTINS. *Thursday,
April 15th.*

PIGOTT, in last term (28th January), obtained a rule calling on the defendant to shew cause why the plaintiff should not be allowed the costs of this action, pursuant to stat. 13 & 14 Vict. c. 61. s. 13.

The affidavit on which the rule was obtained stated that the plaintiff, as administratrix of *Mary Turner*, together with the plaintiff's late husband, took out a writ in the Queen's Bench against the defendant, in 1851, to recover 2*l*. 8*s*. 8*d*. The plaintiff and her husband resided in *Surrey*, and the defendant in *Montgomeryshire*, where he carried on his business; so that, as was stated in the affidavit, the plaintiff and her husband were unable to sue the defendant in the county court within the jurisdiction of which they resided, or in any other county court within twenty miles of their residence. The cause was tried before the undersheriff of *Montgomeryshire*, in April, 1851; and a verdict was found for the plaintiffs for 13*s*. 3*½d*. The attorney for the plaintiffs applied to the undersheriff for a certificate to entitle the plaintiffs to costs, under stat. 13 & 14 Vict. c. 61. s. 12.; but the undersheriff declined to certify on his own authority. On 11th June, 1851, an application was made before *Coleridge J.* at chambers,

In April, 1851, plaintiff recovered in a superior Court a sum under 40*s*. In June, 1851, he took out summons before a Judge at Chambers, for costs, under stat. 13 & 14 Vict. c. 61. s. 13. The Judge, conceiving that, although concurrent jurisdiction was proved, he had a discretion as to making an order for costs, endorsed the summons with the words "no order." In January, 1852, plaintiff moved the Court of Queen's Bench to be allowed the said costs.

Held, that the application must be considered as an appeal from the decision of the Judge at Chambers;

Per Lord Campbell C. J. Applications in the shape of an appeal from the decision of a Judge at Chambers should be made within the term next after such decision.

and that it was made too late.

Volume XVIII. for an order for costs under stat. 13 & 14 Vict. c. 6
 1852. s. 13.; and the learned Judge indorsed the summons
 MEREDITH v.
 GITTINS. "no order."

T. Jones now shewed cause against the rule. First — the Court has no jurisdiction to entertain this application, which is, in effect, an appeal from the decision of the Judge at chambers. Stat. 13 & 14 Vict. c. 61. s. 13. — provides that, if the plaintiff "shall make it appear to the satisfaction of the Court in which such action was brought, or to the satisfaction of a Judge at chambers upon summons," that the cause of action was one which the superior Courts have concurrent jurisdiction or for which no plaint could have been entered in a county court, "the Court," "or the said Judge at chambers, may," by rule or order respectively, direct that the plaintiff shall recover his costs. The jurisdiction of the Court, therefore, is only alternative; and it can entertain an application under this section only when such application is made in the first instance; not after a previous application by the plaintiff to the other tribunal of which sect. 13 gives him the option. [Lord Campbell C. J. Was an order refused at chambers on the ground that it had not been made to appear to the satisfaction of the Judge that the superior courts had concurrent jurisdiction in the case?] That does not appear to have been the ground: the learned Judge considered that the plaintiff, having recovered less than forty shillings, was precluded from recovering costs by stat. 43 Eliz. c. 6 s. 2. [Lord Campbell C. J. Is that ground sufficient? According to *Jones v. Harrison* (b), the Judge's power]

(a) See now stat. 15 & 16 Vict. c. 54. s. 4.

to order costs, where concurrent jurisdiction is proved *Queen's Bench*.
 to his satisfaction, is discretionary; but in *Crake v. Powell* (*a*) we have decided, in accordance with the decision of the Court of Common Pleas in *Macdougall v. Paterson* (*b*), that he is bound, under those circumstances, to make the order.] If the plaintiff elects to go before a Judge at chambers, he cannot question the decision given there, or the grounds of such decision.

Secondly, the application, even if it be one which this Court can entertain, is made too late; *Orchard v. Moisy* (*c*). The application at chambers was made three terms back.

Pigott, contra. In *Orchard v. Moisy* (*c*) the damages had been paid before the application for costs was made, so that there was greater necessity for dispatch than in the present case. [Lord Campbell C. J. The damages were accepted under protest.] The question, what is a reasonable time for making such an application as this, depends upon the particular facts of each case. In *Aspin v. Blackman* (*d*) a delay of two terms was allowed.

Further, the application is not, as has been contended, by way of an appeal from the decision of the Judge at chambers. It is an application for a decision in the first instance, inasmuch as the learned Judge, conceiving that he had a discretion, as was held in *Jones v. Harrison* (*e*), refused to make any order at all. [Wightman J. Is not "no order" equivalent to "summons dismissed?"] Not in the present case, when the grounds upon which

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|---|-------------------------------------|
| (<i>a</i>) 2 <i>E. & B.</i> 210. (<i>Hil Vac.</i> 1852). | (<i>b</i>) 11 <i>Com. B.</i> 755. |
| (<i>c</i>) 2 <i>E. & B.</i> 206. | (<i>d</i>) 7 <i>Exch.</i> 386. |
| (<i>e</i>) 6 <i>Exch.</i> 328. | |

Volume XVIII. the indorsement was made are considered. ^{1852.} The grounds were, not that concurrent jurisdiction had been satisfactorily proved, but that the plaintiff was the learned Judge then conceived, precluded from recovering costs by the statute of *Elizabeth*. [*I. Campbell C. J.* A party must elect in which of two forms he will make his application.] A hal corpus may be applied for in all the three Superior Courts of record in succession. [*Lord Campbell C. Gittins.* That is a case *sui generis*.]

Lord CAMPBELL C. J. This application is made late. We can hear it only in the shape of an appeal from the decision of the Judge at chambers. On 11th June last, the summons at chambers was indorsed "no order;" that is, as I understand it, equivalent to a dismissal of the summons. All *Michaelmas Term* elapses; and no application is made to us till the 2nd January. It is a wholesome rule that any application to this Court in the shape of appeal from a decision of a Judge at chambers should be made within the time next after such decision. I do not think that we ought to take into consideration, as affecting the question of reasonable time, the various decisions in *Westminister Hall* upon the construction of stat. 13 & 14 Vict. c. s. 13.; for in that case a contrary decision, made six years hence, might become the ground of an application here, in the face of all intermediate decisions.

WIGHTMAN J. I am of the same opinion. There must be some limit to the time within which applications against the decision of a Judge at chambers are to be made. I think this application is such an application.

and that the case must be governed by *Orchard v. Queen's Bench*,
Moxsy (a).

MEREDITH
v.
GITTINS.

ERLE J. I think it must be taken here that the words "no order" are equivalent to a dismissal of the summons. Sometimes they mean that the Judge does not choose to interfere. But here I think that the summons was so indorsed in the exercise of the Judge's jurisdiction under the statute, and that he must be considered to have refused the order. That being so, the application is clearly too late.

CROMPTON J. I am of the same opinion. Under stat. 13 & 14 Vict. c. 61. s. 13. plaintiffs have the option of applying for costs either before this Court, or before a Judge at chambers. They must make their election; and, if they elect to go before a Judge at chambers, any subsequent application here, after his decision, is by way of appeal, and, as was decided in *Orchard v. Moxsy* (b), cannot be made after so long a time as has elapsed in the present case. In *Aspin v. Blackman* (b) the application was made to the Court in the first instance, the Judge at chambers having adjourned the case thither.

Rule discharged.

(a) 2 E. & B. 206.

(b) 7 Exch. 386.

Volume XVIII.
1852.

Thursday,
April 15th.

THOMAS NEVE and another, executors &c. of
JOHN NEVE, against JAMES HOLLANDS and
MARY his wife.

Declaration
against
husband and
wife, upon a
joint and
several pro-
missory note
made by the
wife, before
coverture, and
one J. A.,
alleged a
promise by
the wife, dum
sola. Defend-
ants pleaded
the Statute of
Limitations.
The declara-
tion was
amended, after
issue, by in-
serting an alle-
gation of a
subsequent
promise by the
husband.

Plaintiffs

proved a pay-
ment of interest within six years, made by the wife after marriage, with money sent
J. A., but without the privity or subsequent ratification of the husband.

Held, that such payment raised no promise, either by the husband or the wife, so as to
take the case out of the Statute of Limitations: inasmuch as, the wife being incapable
of making any promise in law, express or implied, payment by her or the other joint ma-
of the note could create no promise on her part; and, as such payment was not made
by the husband, or for any consideration affecting him, or with his sanction, it raised no
implied promise on his part.

Per Lord Campbell C. J.: If the payment had been by the husband, or with his sanction,
the declaration, as amended, would have been bad in arrest of judgment, as the wife would
then have been improperly joined in the action.

(a) The declaration was amended, after issue, under a Judge's order, by inserting the words within brackets, in the first and second counts.

**on an account then stated between them; "and the said Queen's Bench.
Mary, whilst she was sole and unmarried," afterwards,
to wit on &c., "in consideration of the last mentioned
premises, promised the said John Neve to pay him the
said last mentioned sum of money on request; [and, the
said sum being wholly due and unpaid, the said James
Hollands, after the marriage of the defendants," "to wit
on 1st January 1850, in consideration of the last men-
tioned premises, promised the said John Neve to pay him
the said last mentioned sum of money on request]: yet
the defendants have not, nor has either of them, paid
the said several sums of money;" and the same remain
wholly due and unpaid.**

Pleas: 1., To the first count, that the said *Mary* did
not, whilst she was sole and unmarried, make the said
promissory note, modo et formâ. Issue thereon.

2., To the residue of the declaration, that the said
Mary, whilst she was sole and unmarried, did not pro-
mise, modo et formâ. Issue thereon.

3., To the whole declaration, that the causes of action
in the declaration mentioned did not, nor did any of
them, accrue within six years next before the commence-
ment of this suit. Replication, that the said causes of
action did accrue &c. Issue thereon.

On the trial, before *Erle* J., at the *Middlesex* sittings
in *Michaelmas* Term, 1851, it appeared that, on 24th
June 1837, defendant *Mary*, then *Mary Fowler*, and
unmarried, together with *John Ayton*, made the following
promissory note:

"24th June 1837.

We jointly and severally promise to pay to Mr. *John Neve* or order on demand fifty pounds with interest

Volume XVIII. for the same at £5 per cent. per annum for the
1852. received.

NEVE
v.
HOLLANDS. £50.

Jno. Ayton.
Mary Fowler."

Interest was regularly paid upon the note for six years. On each payment the note was indorsed by the payee with the date of payment and the following form of words: "Rec'd. a year's interest, due 24th June, John Neve." The defendant *Mary* married in 1843; and, on 1st August 1844, without the knowledge of her husband, paid one year's interest, with money sent on the part of *Ayton*, the note, on that occasion, being indorsed as follows: "*August* 10th 1844. Paid Mr. Neve a year's interest due 24th June last. *Mary Hollands.*" There were several subsequent indorsements like those previously made by the payee; but there was no evidence that the defendant *James Hollands* knew anything of any payment of interest, or of the existence of the promissory note, until this action was brought. *John Neve* died in 1849; and the action was commenced by his executors on 2d August, 1850. It was contended, on behalf of the defendants, that there was no evidence of any promise having been made by *James Hollands*, so as to take the case out of the operation of the Statute of Limitations, inasmuch as the payment of interest by his wife was made without his knowledge or authority; and, further, that, if such promise had been made by the husband, the wife was improperly joined. The jury found that the payment by the wife had not been made with the authority of the husband, or afterwards ratified by him. The learned Judge directed a verdict for the plaintiffs, leave being

reserved to move to enter a verdict for the defendants. *Bramwell*, in last Michaelmas Term, obtained a rule nisi to enter a verdict for the defendants or to arrest judgment.

Queen's Bench.
1852.

NEVE
v.
HOLLANDS.

Crowder and *F. Barrow* now shewed cause. The plaintiffs are entitled to the verdict. The action is against the husband and wife, for a debt contracted by the wife *dum sola*. At the time of the marriage, the note was overdue, and the Statute of Limitations had not begun to run against the wife, the original debtor. Then, by the marriage, the debt of the wife becomes also that of the husband; he is placed in the same position as if he had originally made the note jointly with his wife and *Ayton*; and therefore payment of interest by the wife prevents the operation of the statute equally as regards the husband; *Whitcomb v. Whiting* (*a*). [*Wightman* J. Do you say that the promise by the husband, as alleged in the declaration, is supported by the wife's payment of interest?] The legal effect of such payment is to create an implied promise on the part of the husband. [*Lord Campbell C. J.* There was no evidence here that the payment by the wife was ever authorized by the husband.] His authority is not necessary, where the debt is to be considered as the joint debt of both; *Burleigh v. Stott* (*b*). It is like the case of payment by one partner of a firm, in respect of a partnership debt, after dissolution of the partnership, and without the authority of the other partners; *Goddard v. Ingram* (*c*). [*Wightman J.* Supposing the payment by the wife to create an implied promise on the

(*a*) 1 *Dong.* 652.

(*b*) 8 *B. & C.* 26.

(*c*) 3 *Q. B.* 839.

Volume XVIII. part of the husband, I do not see how the wife can be joined in an action founded upon such implied promise.

NEVE v. HOLLANDS. In an action founded upon a debt contracted by the wife *dum sola*, she must be joined, unless the husband has promised to pay on a consideration affecting himself only. *Mitchinson v. Hewson* (*a*) is in point. The declaration would have been good without the express allegation of a promise by the husband, which was introduced by amendment. But, as it now stands, the declaration accords with the result of the decision *Morris v. Norfolk* (*b*). *Pittam v. Foster* (*c*) may be relied upon for the defendants. But there the action was against both the joint makers of the note and the husband of one; and the acknowledgment was not by the wife, but by the other joint maker, and was relied on as supporting the allegation of a promise made by him and the female defendant *dum sola*.

Bramwell, contra. No action can be supported here against either or both of the defendants. *Tanner v. Smart* (*d*) establishes that the effect of payment, as regards the operation of the Statute of Limitations, is to create a fresh promise by implication. Now here the payment which is relied on was made after the marriage of the female defendant; it could therefore create a fresh promise on her part, as she had become incapable of making any promise at all. It could not create an promise on the part of the husband, because the payment was not made by his authority. If it had been so made, the jury might have inferred a promise by him in consideration of forbearance. But then the action

(*a*) 7 T. R. 348.

(*b*) 1 Taur. 212.

(*c*) 1 B. & C. 248.

(*d*) 6 B. & C. 603.

should have been against the husband only. *Pittam v. Queen's Bench.*
Foster (a) is directly in point.

1852.
—
NEVE
v.
HOLLANDS.

Lord CAMPBELL C. J. I am of opinion that, on the issue raised by the third plea, the defendants are entitled to the verdict. That issue is, whether or not the causes of action alleged in the declaration arose within six years from the commencement of this suit. The only causes of action alleged in the declaration at the time when issue was joined were promises by the defendant *Mary* *dum sola*. The only evidence brought forward in support of these causes of action, for the purpose of taking them out of the operation of the Statute of Limitations, was a payment made by the defendant *Mary* in 1844, after her coverture. But such payment could not have the effect of a promise by her; for at that time she was incapable, as a married woman, of making any promise at all. Payment by or on behalf of *Ayton* would also fail, if made after her marriage, to create any liability on her part. Then, in the declaration, as amended after issue, there are two additional allegations of a promise by the defendant *Mary*'s husband, after the marriage: and all that is brought forward in support of these allegations is the same payment by the defendant *Mary* in 1844, after her marriage. But it is clear that this would not support the promise by the husband, as laid; for the payment was not authorized by him at the time, or ratified by him afterwards. It is unnecessary to decide whether these amendments are good or bad, although, in my opinion, they are clearly bad, and,

(a) 1 B. & C. 248.

Volume XVIII. if the payment had been proved to have been made
1852. with the husband's authority, the declaration as amended

^{NEVE}
v.
^{HOLLANDS.} would be bad in arrest of judgment, because the wife
could not be joined under those circumstances. But even supposing the amendments to be good, the plaintiffs would have failed, under either form of the declaration, to support the issue raised by them upon the third plea. The rule must, therefore, be absolute to enter a verdict for the defendants.

WIGHTMAN J. I am of the same opinion. The action is brought upon a promissory note made in 1837 by the female defendant, *dum sola*, and another person; and the only promises alleged in the declaration, as it originally stood, were promises by the female defendant *dum sola*. The defendants pleaded the Statute of Limitations; and the plaintiffs, in order to take the case out of the operation of that statute, rely on a payment made by the female defendant after her marriage. But, as the declaration was originally framed, such evidence was wholly beside the issue, which was, whether any promise by the female defendant *before marriage* was made within six years before the action. Now she had been married more than six years before the action, and therefore could not have been, during all that time, incapable of making any promise. Then the declaration is amended by inserting allegations of a promise by the husband. But the issue raised by the plaintiffs upon that amendment could not be supported, inasmuch as the jury found that the payment by the wife after her marriage, which was relied on as supporting such issue, was made without the privity of the husband. The declaration, therefore, is

either shape, cannot be supported; and it is unnecessary *Queen's Bench.*
to enter into the question whether the declaration, as 1852.
amended, is bad in arrest of judgment.

NEVE
v.
HOLLANDS.

ERLE J. This action is brought upon a promise made by the defendant *Mary Hollands* dum sola; and the plaintiffs are bound to shew that such a promise was made within the last six years. The only promise which they shew as made within the last six years is not such a promise, but a promise made by her after her coverture, when she was incapable of making any promise in law, express or implied. The promise by the husband, introduced into the declaration by amendment, is not the cause of action originally declared on, and is not a cause of action at all; for the payment relied on as creating such a promise by implication was not made by him, but was made by the wife without his privity or any subsequent ratification by him. The fact that it was made with the money of *Ayton* makes no difference in the question of the defendant *Mary's* liability: if she could not, by reason of her coverture, revive her liability by an express promise or a payment creating a promise by implication, neither could her liability be revived by a promise, express or implied, of her co-contractor.

CHOMPTON J. This is an action against husband and wife jointly, on a promise made by the wife before her coverture. The plaintiffs are bound, therefore, to make out a joint liability of the defendants within six years, arising from such promise. But the only promise brought forward in support of such liability is a promise made by the wife *after* coverture. That is, for the reasons laid

Volume XVIII. down in *Pittam v. Foster* (*a*), no promise at all in po
1852. of law, and binds neither herself nor (since it was m
 NEVE without his privity or authority) her husband. The promise by the husband therefore, which was afterwa
 v.
 HOLLANDS. introduced into the declaration, has no existence, un
 the circumstances of the case. The plaintiffs, then, h
 failed, as it seems to me, in shewing the liability of eit
 the husband or the wife. The fact that the payment
 the wife after marriage was made with the money
Ayton, the other joint maker of the note, was not reli
 on by the plaintiffs; and it is clear that no payment
 or on behalf of him, after the marriage of the fem
 defendant, could create any implied promise on her pa
 inasmuch as she was then incapable of making a
 promise, express or implied. The verdict must theref
 be entered for the defendants.

Rule absolute to enter verd
 for defendants.

(*a*) 1 B. & C. 248.

Friday,
April 16th.

The QUEEN *against* CAUDWELL.

See 17 Q. B. 504, note (*c*).

Queen's Bench.
1852.

BEAR and others *against* BROMLEY.

Friday,
April 16th.

A SSUMPSIT by payees against maker of a promissory note, dated 8th *March* 1849, and payable to plaintiffs or their order, for 80*l.* with interest at 5 per cent. There was also a count on an account stated.

Fourth plea. That the consideration for the promissory note in the first count mentioned was money lent to defendant by a Joint Stock Company, that is to say a partnership which before and at the time of the said lending consisted of more than twenty five members, the said number not being caused by an admission subsequent on devolution or other act of law, which said Joint Stock Company had, before the said lending and after 1st *November* 1844, to wit on 1st *September* 1848, been established at *Colchester*, in the county of *Essex*, for a purpose of profit, to wit for the purpose of lending money at interest, and making profit thereby, and was not a banking company, school, or scientific or literary institution, or friendly society, or loan society, or benefit building society, nor incorporated by statute or charter, nor authorized by statute or letters patent to sue and be sued in the name of any officer or person. And defendant further says that in lending the said money to defendant the said Company acted otherwise than provisionally in accordance with the statute in such case

A Society consisting of more than twenty five shareholders raised a fund by monthly subscriptions from each shareholder, out of which sums were occasionally advanced by way of loan, at 5 per cent. interest, to the highest bidder among the shareholders; the advance not to be less than 20*l.*, nor more than the amount subscribed for by him. The additional subscription paid by such highest bidder for the preference of having the loan was payable by monthly instalments; and fines were incurred in default of payment: the fines and monthly instalments, and the interest upon the loans,

being added to the general fund of the Society. The repayment of the loans was secured to the Society in the names of three trustees.

Held, that the Society was not a joint stock company established "for any purpose of profit," within stat. 7 & 8 Vict. c. 110. s. 2., and might therefore make the loans in question without having obtained a certificate of complete registration.

Volume XVIII. made, and that the said Company had not, at the time
 1852. of lending the said money, obtained a certificate of complete registration as provided in and by the statute
 BEAR
 v.
 BROMLEY. such case made; but the said Company, at the time of making the said note, to wit on 8th *March* 1849, gallantly and contrary to the form of the statute in such case made, lent to defendant a certain sum of money, to the sum of 80*l.*, out of the funds of the said Company, at interest, and with a view to the profit of the said Company, and in the course of carrying on the business of the said Company. And defendant further says that he made the said note and delivered the same to plaintiffs, they then being the trustees of the said Company and at the request of the said Company, and for the benefit, to secure to the said Company the payment of the money so lent and interest as aforesaid, and consideration of the said loan, and without any other value or consideration. And

That the account stated, in the second count mentioned, was stated of and concerning the said money due on the said note and none other. Verification.

Replication, De injuriâ. Issue thereon.

On the trial, before Lord *Campbell* C. J., at the London sittings, it appeared that the Society consists of more than twenty five members, and had raised a subscription fund, kept up by monthly contributions for the purpose of advancing portions of it, by way of loan, to the various members from time to time, at 5 cent. interest.

The Society's list of rules was preceded by the following preamble :

"Whereas the several persons, members of this Society, whose names are inscribed in the book containing the amount of their shares there-

have, for their mutual benefit, by subscriptions every four weeks, raised a sum of money, and have agreed, by further monthly subscriptions, to be paid every Monday four weeks during the continuance of the said Society as after mentioned, to raise a further sum of money, with the intention of afterwards lending or advancing the same to some of the said parties at interest at the rate of 5*l.* for every 100*l.* by the year, in the proportions, in such manner, and under such regulations, as are hereafter mentioned, so that every member of the Society shall have advanced or allotted to him on loan a sum of money as after mentioned."

Queen's Bench.
1852.

BEAR
v.
BROMLEY.

The first rule of the Society provided for the place and times of meeting of the Society, and particularly that the thirteenth monthly meeting, from 11th September 1848, should be a general annual meeting, at which no interest should be paid, but all sums on whatever account due from members should be paid.

The rules then went on to provide officers for the Society, and the mode of their election &c.; and that the secretary should keep accounts, which should be open to the inspection of all the members at the monthly meetings.

By rule 4 a committee of seven was to be chosen from the members, which might accept either real or personal security for the money advanced to the members, and approve or disapprove of the securities proposed for securing the money allotted to them out of the fund of the Society.

Rule 7 was as follows :

" Every member of this Society, his executors or administrators, shall pay to the president or his deputy, or person acting as such, at every monthly meeting, during the first hour of business, viz., from seven to eight o'clock, two shillings and six pence upon every ten pounds for which he shall subscribe; and when he shall have a loan or allotment of money from the fund or stock of the club, he shall also pay the additional subscription he shall agree to give for the preference of having such loan, by monthly instalments of two shillings upon every ten pounds so advanced or allotted to him, until the whole of such additional subscriptions shall be paid, together with interest for such loan or sum so advanced, after the rate of 5*l.* for 100*l.* by the year."

Volume XVIII. Rule 8 imposed certain fines for non-payment of
1852. subscriptions and arrears.

BEAR
v.
BROMLEY.

By rule 11 it was declared that

"When the treasurer shall have in hand, at any of the monthly meetings, the sum of 20*l.* of the money so subscribed at any of the monthly meetings, the same shall be put up for sale, the highest bidder to be the purchaser; and he may have from the fund any sum not less than 20*l.* (except by the consent of the committee), nor more than the sum he subscribed for. He shall at the same time inform the secretary what sum he will take, and within one day inform the secretary, in writing, the names, trades, and places of abode of the persons he may purpose as sureties for the money, or the nature and particulars of any other security he may purpose to give and, upon giving approved security to the committee of the Society for the same, shall have such advance or allotment of money paid to him by the treasurer, on paying the stamp duty upon the security given and entered into by him and his sureties, or the expense of such other security as may be accepted. Any person shall be at liberty, with the sanction of the committee, to take by purchase to the amount of subscriptions paid by him to the Society in sums not less than 20*l.*, without giving security on stamp. Should there at any time be no bidders, the money in hand shall be allotted by ballot. The first drawn shall take the amount of his share on his security, at interest, without stamp, to the amount of subscription paid him to the Society; but above that amount he must give security to the satisfaction of the committee; and if the person drawn does not take all the money, to continue drawing till disposed of. If any member does not take the money he agreed to have at any monthly meeting, he shall pay, at the next monthly meeting, one month's interest on the sum he agreed to take, and also whatever sum may be deficient in the additional subscription which shall be agreed to be given at the next monthly meeting, when the same shall be disposed of. All moneys that shall from time to time be disposed of by way of sale shall be secured to the Society in the names of three persons, to be appointed by the Society, to be called trustees; and it shall not be necessary that such persons be members of the Society. And if a member of the committee or officer becomes purchaser of any loan of money, such member shall not be present when his sureties shall be taken into consideration. Should any member purchasing from the funds of the Society, or either of his sureties, die, become bankrupt or insolvent, depart the country, or compound with his creditors, the committee may, if they think proper, require additional security, or take such other means to obtain payment of the amount due to the Society on the note given as they may deem fit."

By rule 14 it was declared that

"All monthly and additional subscriptions, interests, fines, forfeitures (except fines of the committee-men for neglecting to attend the monthly

meetings of the committee at the time appointed), extra and other payments, shall be paid to the treasurer, and shall constitute and be the fund or stock of the Society; and all expenses incurred by the treasurer, the secretary, the committee, or any other member of the Society, in or about the affairs and concerns of the Society, under the direction and authority of any monthly or special general meeting of the committee, shall be paid out of the fund or stock."

Queen's Bench.
1852.

BEAS
v.
BROMLEY.

By rule 15 it was declared that

"Immediate payment shall be made to the treasurer of all sums for which the members are, or shall be, liable on any note, or under these or any other subsequent rules, orders, or regulations, to be duly made; and which sums shall be recoverable by law as liquidated damages; or the treasurer, at his option, may retain and deduct the same from any money in his hands which shall have been subscribed by the person from whom such payments are to be made."

Two shares in the Society had been put up to auction, and bought by the defendant, who gave the promissory note in question as security for payment. The learned Judge directed a verdict for the plaintiffs upon all the issues, with leave to move to enter a verdict for the defendant upon the fourth issue.

Horn now moved accordingly. The Society is clearly a joint stock Company established for a purpose of profit within the operation of stat. 7 & 8 Vict. c. 110., as defined by sect. 2. *Silver v. Barnes* (a) shews that, where the members of a benefit society raise a joint stock fund, portions of which are from time to time advanced to members of the society by way of loan, each loan being put up to competition and given to the highest bidder, such advances are to be considered as dealing with the funds of the partnership, and not as mere loans. *Beaumont v. Meredith* (b) is also in point. And the partnership here is clearly established for the

(a) 6 New C. 180.

(b) 3 Ves. & B. 180.

Volume XVIII. purpose of profit. [Wightman J. The members at ~~the~~ in 1852. as they began: all the funds must be divided.] So ~~the~~ of the members gain at the expence of others. [L~~e~~ C. J. Suppose this were a corporate body has the body any profit?] That can hardly be considered the criterion: but, if it be, the doctrine in *Sil~~e~~ v. Barnes* (a) applies. [Erle J. *Silver v. Barnes* (a) decisive against you on that point.] It decides that although a loan of this nature is not usurious, it is, effect, a dealing with a partnership fund. [Erle J. cit. *Regina v. Whitmarsh* (b).] In that case the Court decided that, where powers were given to a joint stock Company to purchase and sell land, as subsidiary to the government of providing allotments for the members, the fact of profits accidentally arising from such purchases or sales did not bring the company within stat. 7 & Vict. c. 110. s. 2., the profits not being the purpose which the company was established. [Erle J. In fact by profit, in stat. 7 & 8 Vict. c. 110. s. 2., is meant profit arising from others, not profits or advantages raised from, and accruing to, only the members of the company.] The latter can hardly be excluded from the definition. Building societies are expressly exempted by sect. 2, which would not have been necessary if the meaning of a society "established for any purpose of profit" were restricted as is suggested.

Lord CAMPBELL C. J. The point is one which is worthy of being considered; but it has already been argued and decided in *Regina v. Whitmarsh* (b). The question is, whether the Society, as such, is established for a purpose of profit: the fact that the individu-

(a) 6 New Ca. 180.

(b) 15 Q. B. 600.

members may be losers or gainers is immaterial. That *Queen's Bench.*
may be the case here; but it is clear that the Society
itself does not derive a profit from its transactions. It is
not, therefore, within the meaning of stat. 7 & 8 Vict.
c. 110. s. 2.

1852.

BEAR
v.
BROMLEY.

WIGHTMAN J. The allegation as to profit which the
plea introduces is not proved. The case is precisely
similar to *Regina v. Whitmarsh (a)*.

ERLE J. The transactions of the Society are by
virtue of powers which are only subsidiary to a general
purpose, and that not a purpose of profit. Profits arising
from such transactions are not profits to the Society
within the meaning of stat. 7 & 8 Vict. c. 110. s. 2.

(No fourth Judge was present.)

Rule refused.

(a) 15 Q. B. 600.

**WALKER and others against The BRITISH
GUARANTEE ASSOCIATION.**

Saturday,
April 17th.

COVENANT. The plaintiffs, stating themselves to be trustees of *The Lancashire & Yorkshire Benefit*

The treasurer
of a Benefit
Building
Society within
stats. 6 & 7

W. 4. c. 32. and 10 G. 4. c. 56., having covenanted with the Society's trustees that he will faithfully discharge the duties of treasurer, duly obey the directions of the trustees in relation to such duties, and punctually account to the trustees for all and every sum and summs of money, bills, notes, securities, goods and chattels, which he, in his office of treasurer, shall receive on the Society's account, and being bound, by the rules of the Society, to pay over in a given time the same moneys which he shall receive, does not violate such obligation if, after receiving moneys, and before he has an opportunity of paying them over, he is robbed of them by irresistible violence and without fault of his own; such obligation being that only of a bailee.

So held in an action by trustees of such Society against sureties of a treasurer, complaining that he had not paid *the said* moneys, to which the sureties pleaded such robbery, committed uppon their principal, in excuse of his nonpayment.

Volume XVIII. *Building Society*, and authorized, according to the statu
1852.
in that case made &c., to sue on behalf of that Socie
declared against *The British Guarantee Associa*
For that, whereas the said Society, before and at the ti
of the making of the policy after mentioned, was, a
from thence continued &c., and still is, a Bene
Building Society established under an Act &c. (6 &
W. 4. c. 32. "for the regulation of benefit buildir
societies"): And whereas &c.: the declaration the
averred that, at the time of the making of the polic
the rules of the Society had been duly certified, enrolle
&c., according to law, and the Society then was, a
from thence hitherto hath been and still is, entitled
the benefit of the said acts of parliament: And the
upon, by a certain deed and policy of guarante ma
27th December, 1849, between *James Jones* of the fi
part, defendants of the second part, the plaintiff *Wal*
and others (named), as, and then being, the trustees
the Society, of the third part (profert), after reciting
the fact was, that *James Jones* had been appoin
treasurer to the said Society, and that, he having b
required to find security for the due and faithful
charge of his duties whilst he should be employe
such treasurer to the said Society, the defendants at
request of the said *J. J.*, and in consideration of
annual sum or premium of 12*l. 10s.* to be therefore *Pa*
by the said *J. J.* to the defendants, had covenante
give such security upon the terms, &c., thereinafter men
tioned, and the said *J. J.* had agreed to enter into the
covenants therein contained: It was witnessed that the
defendants thereby covenanted with the trustees in the
said policy mentioned that *J. J.* should and would
from time to time, and at all times thereafter whilst he

WALKER
v.
GUARANTEE
ASSOCIATION.

Queen's Bench.
1852.

WALKER
v.
GUARANTEE
ASSOCIATION.

continued in his said office and employment, duly and faithfully discharge all and every the duties of his said office and employment, and in all things and at all times faithfully and duly obey the directions and instructions of the said then trustees, and of the trustees for the time being of the said Building Society, in all particulars in relation to the duties of his situation, and in particular should and would faithfully, honestly and punctually account to the said then trustees, and to the trustees for the time being of the said Society, for all and every sum and sums of money, bank notes, drafts, bills of exchange, promissory notes or securities for money, goods and chattels, which he the said J. J., whilst acting in his said office or employment, should from time to time receive on account of the said then trustees &c. And also that he the said J. J., his executors or administrators, should from time to time, upon request or demand, give in or deliver up true and perfect accounts in writing of all moneys received by him, and of all payments made by him thereout as such treasurer as aforesaid or in such office or employment as aforesaid, to the said then trustees &c., or to such person or persons as should be by them appointed to receive the same. And that J. J., his executors &c., or the defendants, should from time to time &c. indemnify the then trustees and the trustees for the time being of the Society from all loss &c. which they or the Society might sustain, or which might be occasioned, by or through the acts or defaults of the said J. J. whilst in his said office or employment, or for or by reason of the breach by the said J. J., his executors, &c., of any of the covenants therein contained, and generally for or by reason of any and every failure of whatever nature on the part of the said

Volume XVIII. *J. J.* rightly to discharge the duties of his said office on 1852. employment. Then followed a covenant that the Association should be liable for any such loss or damage in the event only of the trustees giving the defendants a certificate or statement in writing of any such loss or damage within fourteen days after the same should have come to their knowledge; stipulations as to the mode of certifying; and covenant that, from and after the delivery of any such certificate or statement to the defendants, the defendants should ipso facto and without any notice or intimation whatever be deemed to be discharged from the obligation thereby undertaken, so far as regarded the acts and defaults of the said *J. J.* subsequent to the delivery of such certificate: conditions, not material here, as to the claim and payment in respect of any such loss or damage: covenant that the Association, its individual members or its funds, should not be liable under his policy to pay to the trustees beyond the amount of 1000*l.*: and covenant for cessation of the guarantie on default by *J. J.* in paying defendants the yearly premium of 12*l.* 10*s.*, or if defendants should give notice (as the covenant specified) of their intention to determine the guarantie.

The declaration then alleged that *J. J.* continued to be and was treasurer of the Society from the time of the making of the said policy to the commencement of this suit, that he duly paid his premiums, and that the policy continued in force from the making thereof until at and after the time of the loss and of the statement of particulars in writing, after mentioned: And that, after the making of the policy, and before 30th November 1851, and while plaintiffs were the trustees for the time being of the said Society, viz. on 30th April 1851, the said

Queen's Bench.
1852.

WALKER
v.
GUARANTEE
ASSOCIATION.

J. J. actually received, as such treasurer as aforesaid, and in the discharge of his duty as such treasurer, certain moneys of the said Building Society, amounting to 170*l.*, on account of and for the use of the said Society: and, although the said *J. J.*, according to the rules of the said Society and the directions of them the plaintiffs as such trustees as aforesaid, and in the due and faithful discharge of his duty as such treasurer, as he the said *J. J.* then well knew, could and might and ought to have paid over the same moneys to the bankers of the said Society, to wit to *The National Provincial Bank of England* at their branch bank at *Manchester*, to the credit of the plaintiffs as such trustees as aforesaid, within a short time after he had received the same, to wit during the then next day; yet the said *J. J.* did not within such last mentioned time or at any other time pay the said moneys or any part thereof to the said bankers of the said Society, but wholly omitted and neglected so to do, contrary to his duty as such treasurer of the said Society as aforesaid. And, although the said *J. J.*, after he had so omitted to pay the said moneys &c. as aforesaid, and before the giving the statement of the particulars of loss hereinafter mentioned, and before 30th November 1851, to wit on 2d May 1851, was requested by the said Society, and by the plaintiffs as such trustees as aforesaid, to pay plaintiffs as such trustees the said moneys which had been so received by *J. J.* &c., and which moneys he the said *J. J.* was then bound in the due and faithful discharge of his duty as such treasurer to have paid to plaintiffs as such trustees, and although a reasonable time for the said *J. J.* to have paid the said moneys to plaintiffs as such trustees &c. had elapsed before the giving by plaintiffs of the notice

Q. B. EASTER TERM.

VIII. of loss after mentioned: Yet &c.; allegation that *J. J.* did not pay the said moneys or any part thereof to the Society or to plaintiffs, but wholly neglected &c., and therein wholly failed &c.; and thereby, and by reason of the said acts and defaults of *J. J.* as such treasurer, the said moneys then became and were and still are wholly lost to the said Society and to plaintiffs as such trustees as aforesaid. The count then averred due notice to defendants of the loss, with other allegations necessary to the establishment of their claim according to the above recited covenants; and stated, as breach, that defendants had not paid the amount of the said loss or any part thereof, nor indemnified the Society, or plaintiffs as trustees.

Pleas: 1. Non est factum. Issue thereon. 2. Denial of the receipt of the moneys by *J. J.* as treasurer: conclusion to the country. Issue thereon. 3. Payment of the moneys by *J. J.* as treasurer: conclusion to the country. Issue thereon. 5. Omission of plaintiffs to give a certificate, as required by the deed, within fourteen days after knowledge of the alleged loss: conclusion to the country. Issue thereon.

The 4th plea was as follows.

That, after the said *James Jones*, as such treasurer as aforesaid, had received the said moneys as in the declaration in that behalf mentioned, and before the said time at which he ought to have paid or could have paid the same to the said bankers of the said Society as in the said declaration in that behalf mentioned, to wit on the 30th day of April, A. D. 1851, the said *J. J.*, without a act or default of him the said *J. J.*, or any negligence want of due or proper care by or on the part of the said *J. J.*, was robbed by violence of the whole

the said moneys, to wit, by the same being then *Queen's Bench.*
 feloniously and violently stolen, taken and carried away
 from the person and against the will of the said J. J.;
 and thereby the said J. J. was unavoidably, without any
 act or default of him the said J. J., prevented from
 paying, and could not pay, the said moneys to the said
 bankers of the said Society. Verification. Replication,
De Injuriâ. Issue thereon.

On the trial, before *Cresswell* J., at the last *Liverpool Spring Assizes*, a verdict was found for the defendants on the 4th issue; for the plaintiffs on all the others; and the damages were assessed contingently at **16 l. 16s. 2d.**

Knowles now moved (a) for judgment non obstante veredicto. The fourth plea is no answer. The declaration charges *Jones* with having received moneys as treasurer "on account of and for the use of" the Society: and the defendants had covenanted that he should faithfully account to the trustees for all moneys so received. The allegation now made, of a loss by robbery, is not such an accounting. The duty is, not merely to render an account, but to pay. Money, once received by the treasurer on the Society's behalf, constitutes a debt, which is not discharged by the debtor's loss, however unavoidable. The Legislature has given sanction to societies of this kind for purposes of public benefit, as appears by the preambles to stat. 6 & 7 W. 4. c. 32. s. 1, and to sect. 2 of stat. 10 G. 4. c. 56., which statute, so far as it is applicable, is incorporated with stat. 6 & 7 W. 4. c. 32. by sect. 4 of that Act. The treasurer

1852.
 WALKER
 v.
 GUARANTEE
 ASSOCIATION.

(a) Before Lord *Campbell* C. J., *Wightman*, *Erle* and *Crompton* Js.

Volume XVIII. could have paid, the same to the bankers, he, without
1852. any default or negligence or want of due care on his
~~WALKER~~
~~v.~~
~~GUARANTEE~~
~~ASSOCIATION.~~ part, was robbed by violence of the whole of the said
moneys, by the same being feloniously and violently
stolen and carried away from his person; and thereby he
was unavoidably, and without any act or default of his,
prevented from paying the said moneys to the bankers ~~or~~
of the Society.

This plea (found to be true) alleges a loss of the moneys by *irresistible violence*; and the general doctrine is not denied, that, if the subject matter bailed be lost by *vis major*, which we translate *irresistible violence*, the bailee is discharged. If *James Jones*, the principal, were guilty of no default, the defendants, as his sureties cannot be liable. Reliance however is placed on stat. 6 & 7 W. 4. c. 32. s. 4. and 10 G. 4. c. 56. s. 22., which it is said that, as soon as the treasurer of such Society receives any money on account of the Society ~~he~~ *eo instanti* becomes a *debtor* to the Society; so ~~the~~ payment alone can discharge him from his liability. But we think this must be confined to such money received by him as he might use as his own, he being at liberty to pay the debt with other moneys. He cannot, in respect of one receipt by him as treasurer, be considered at the same time as bailee of specific, ear-marked, money and a debtor to the same amount with the power discharging his engagement by payment of an equivalent sum from any source, or in any denomination of coin in any paper securities which pass as cash. According to the averment in this declaration, *James Jones* undoubtedly bailee of the 170*l.*; and therefore he is not a debtor to that amount. As bailee, the relation in which he stood to the Society, he was

charged by the robbery. If this were not so, his liability would be greater than that of a common carrier; for he would not even be discharged by the act of God or of the Queen's enemies; and indeed Mr. *Knowles* was driven to contend that, if, while carrying to the bankers a bag of gold representing the 170*l.* within a few minutes after receiving it, an earthquake had swallowed it up, he still would have been debtor to the Society for the amount. But we are of opinion that the statutes relied upon were not intended to cast such an extraordinary liability upon an officer of such a Society, or upon his sureties.

*Queen's Bench.
1852.*

**WALKER
v.
GUARANTEE
ASSOCIATION.**

Entertaining no doubt upon these points, we think that Mr. *Knowles* should take nothing by his motion.

Rule refused.

The Company of Proprietors of The ROCHDALE *Saturday,
April 17th.*
Canal against RADCLIFFE.

CASE. The action was commenced in June 1848. A company was established, by stat. 34 G. 3. c. 78., for making and maintaining a certain navigable canal; and, by sect. 113, reciting that the erection of steam engines near to the navigation might promote its interests, it was made lawful for the owners of lands within twenty yards of the canal to draw off water sufficient to supply such engines for the sole purpose of condensing the steam used for working them; such water to be returned into the canal (allowing for inevitable waste), so that no obstruction should arise to the navigation.

The Company sued *R.* in case, for that he, being possessed of land within twenty yards of the canal, and of a mill and steam engine on such land, drew water from the canal more than sufficient for the sole purpose of condensing &c., and used the same for other purposes than that of condensing &c.; whereby plaintiffs lost and were deprived of the water. Plea, that defendant was tenant of land situate &c. and abutting &c., and was the occupier of a certain mill erected on the said land and abutting on the canal, and of a certain steam engine in the said mill, being the land, mill and engine mentioned in the declaration: and that defendant and all occupiers of the said land, mill and engine had for twenty years used as of right &c. the easement of drawing from time to time from the canal such

Volume XVIII. certain Act &c., 34 G. 3. c. 78. (a), "for making an
1852. maintaining a navigable canal from the *Calder* Naviga-
tion, at or near *Sowerby Bridge* wharf, in the parish
Halifax," &c., "to join the canal of his Grace the Duke
of *Bridgewater*, in the parish of *Manchester*," &c., "as
also certain cuts from the said intended canal," a
before and at the time of the committing &c., and fr-

**ROCHDALE
Canal
Company
v.
RADCLIFFE.**

quantities of
water as were
necessary, for
other purposes

than that of condensing &c., to wit for the purposes of supplying the boilers of the crane; with water, of generating steam to work the engine, of heating the said mill, of cleaning the boilers, and of supplying water to a certain cistern, *to wit a cistern on the roof of a certain engine house on the said land*: and that defendant, in exercise of his said right, did off the water at the times when &c., for the purposes aforesaid. Replication, traversing enjoyment and right as alleged. Issue thereon. It appeared in evidence that a mill of defendant called *The Old Mill*, with a steam engine, abutting on the canal, had existed more than twenty years; that within twenty years a new mill, with another engine, had been erected, adjoining to and communicating with the *Old Mill*, water passing from one to other, and the machinery of one being worked by power from the other: and that the water of the canal had been used in both mills (in the Old during more than twenty years), for purposes mentioned in the plea, except that of supplying a cistern on the roof of the engine house; there being no cistern in that place. The jury found (in answer to questions put by the Judge) that the buildings constituted one mill, and that the user proved had been a right; and a verdict was taken for the plaintiffs. On motion to enter a verdict for defendant.

Held, that the justification in respect of "a certain mill" was supported by the proof of defendant having occupied and used the water for the Old mill during twenty years; that, if plaintiffs meant to rely upon the more modern user in the new mill, they should have new assigned. And

That the failure of proof as to the cistern did not entitle the plaintiffs to an entire verdict on the issue joined, but that the verdict might be entered distributively, with nominal damages for the user not justified in proof.

The plaintiffs moved for judgment non obstante veredicto on the same issue, and relied upon the above Act and others establishing and regulating their canal, which gave public a right, for the purposes of the navigation, to use the canal and the adjoining ways, paying certain rates, empowered the Company to raise money on the security of such rates, and obliged them to convey all their waste water into the Duke of Bridgewater's canal.

Held, that the Company could not, consistently with these enactments, have granted water for other purposes than that permitted by stat. 34 G. 3. c. 78. s. 113.: That an act grant, if proved, for the purposes mentioned in the plea, would have been illegal and unjustification: and, therefore, That the grant for such purposes, implied from twenty years' user, was no legal defence to this action. Judgment for plaintiffs, non obstante veredicto.

(a) By sect. 1, after a recital that the making of a navigable canal and cuts as there described will tend to promote the trade &c. of the kingdom and be in other respects of great public utility, certain persons named, and their successors &c., are "united, into a company for the making, completing, and maintaining the said navigable canal and cuts, according to the rules, orders, and directions hereinafter expressed," and are for the purpose to "be and become one body corporate, by the name of The Company of Proprietors of the Rochdale Canal" &c.

thence hitherto, the plaintiffs had been and were lawfully possessed of a certain canal and also a certain cut for the navigation of boats, barges and other vessels, branching from the said canal at or near a certain place called &c. in the township of *Castleton* in the parish of *Rochdale* to or near a place called &c. in the same township and parish, the said canal and cut consisting of and being, during all the time aforesaid, land covered with water, and continuing and being during all the time aforesaid a navigable canal and cut respectively, and respectively made after the passing of the said Act and long before the committing &c., by the plaintiffs by virtue and in pursuance of and according to the powers and provisions in the said Act contained, and, before and at the time of the committing &c., continuing to be and being such navigable canal and cut respectively maintained by the plaintiffs under and by virtue of the powers of the said Act for the purposes in the said Act specified: The count then alleged that defendant was possessed of certain lands within twenty yards of the said cut, and of a mill, and steam engine for working the same, upon the said lands, and of certain pipes &c., and that he drew off water from the canal by the said pipes, and wrongfully and against the form of the statute &c. used the said water for other purposes than were allowed by law. It is unnecessary to state more of this count. Plea 1, to the first count, alleged a twenty years' user in right of premises situate in *Richard Street* in the parish of *Rochdale*. The plaintiffs new assigned; the defendant demurred generally to the new assignment; and judgment was given for the plaintiffs on the demurrer.

Second count. That, whereas, after the making of the said act of parliament, and before and at the time of the

Queen's Bench.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

Volume XVIII. committing &c., and from thence hitherto, the plaintiff
had been and were lawfully possessed of the said canal
1852.

ROCHDALE
Canal
Company
v.

RADCLIFFE.

and cut in the said first count mentioned, the same canal and cut consisting of and being, during all the time in this count aforesaid, land covered with water, and continuing and being during all the time aforesaid a navigable canal and cut respectively, and respectively made, after the passing of the said Act and long before the committing &c., by the plaintiffs, by virtue and in pursuance as aforesaid, and, before and at the time of the committing &c., continuing to be and being such navigable canal and cut respectively maintained by the plaintiffs as aforesaid. And whereas also, before and at the time of the committing &c., the defendant was and still is possessed of certain lands within the distance of twenty yards from the said cut, and of a certain mill and a certain steam engine then being on the said lands, the same engine being, before and at the time of committing &c., erected and used by the defendant for the purpose of working the said mill: Nevertheless the defendant wrongfully and injuriously deceived and defrauded the plaintiffs in this, to wit that defendant heretofore, to wit on 1st January A. D. 1846, and divers other days &c., wrongfully and injuriously, and against the form of the statute in such case &c., drew abstracted and diverted from the said cut, by and means of divers to wit five drains and five sluices, divers large quantities of water, the same being more water than sufficient to supply the said engine on each or any of the said days or otherwise with cold water for the sole purpose of condensing the steam used for working the said engine; to wit 100,000 tons more on each of the said days than was sufficient as aforesaid. And plaintiff

Queen's Bench.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

further say that defendant further wrongfully and injuriously deceived and defrauded the plaintiffs in this, to wit that defendant heretofore, to wit on &c. and on divers other days &c., wrongfully and injuriously and against the form of the statute in such case &c., used and applied divers large quantities of water, to wit 100,000 tons, theretofore drawn as in this count is aforesaid by him the defendant from the said cut, to other and different purposes and uses than the condensing the steam used for working the said engine; whereby the plaintiffs lost and were deprived of the said water. To the damage of the plaintiffs of 100l. &c. (a).

Plea 2, to the second count, Not Guilty. Issue thereon.

Plea 3, to the same, so far as it related to using the water for other and different purposes &c.: That the water mentioned in that part of the count to which the plea is pleaded was not drawn from the said cut in the second count mentioned in manner and form &c. Conclusion to the country. Issue thereon.

Plea 4, to the same count: That, before and at the time of the committing &c., defendant was, and thence hitherto hath been, and still is, the occupier of certain lands as tenant thereof under and by virtue of a certain lease to him thereof for a certain term, to wit for a term of seven years from &c., by a certain indenture &c., to wit of four acres of land situate, lying and being in a certain street called *Richard Street* in the parish of *Rochdale* in the county of *Lancaster*, and abutting eastwardly on the said cut so in the possession of the plaintiffs as in the said second count is mentioned: and

(a) See *Rochdale Canal Company v. Walmsley*, 14 Q. B. 136, note (e).

Volume XVIII. that defendant, at the said several times when &c., was,
1852.
ROCHDALE
Canal
Company
v.
RADCLIFFE.

that defendant, at the said several times when &c., was, and thence hitherto hath been, and still is, the occupier of a certain mill, erected and being upon the said lands hereinbefore mentioned, and abutting eastwardly on the said last mentioned cut, and of a certain steam engine in the said mill; the said lands, mill and steam engine in this plea aforesaid being the lands, mill and steam engine in the second count of the declaration mentioned: and that the said cut in the said second count mentioned had been and was continually for a long space of time to wit for the space of fifty years next before the commencement of this suit, connected with the said lands, mill and steam engine in this plea aforesaid by means of divers, to wit five, drains, and divers, to wit five, sluices, being the drains and sluices in the said second count mentioned: and that defendant, whilst such occupier as in this plea aforesaid, and all occupiers for the time being of the said lands, mill and steam engine in this plea aforesaid, have, and each of them hath, whilst such occupier and occupiers as in this plea aforesaid, a right and without interruption, for and during the full period of twenty years next before the commencement of this suit, had, used, exercised and actually enjoyed and have, and each of them hath, been used and accustomed, whilst such occupier and occupiers &c., a right and without interruption for and during the period of twenty years in this plea aforesaid, to use &c., and of right ought &c., for and during the period of twenty years in this plea aforesaid, as of and without interruption, to have had, used, &c., and defendant, so being such occupier as in this plea aforesaid, at the said several times when &c., of right ought to have had, used, &c., and still of right ought to have

Queen's Bench.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

use &c., for himself and themselves respectively, whilst occupier and occupiers of the said lands, mill and steam engine in this plea in that behalf aforesaid, the right, privilege and easement of drawing from time to time, as of right and without interruption, from and out of the said cut in the said second count mentioned, to wit through and by means of the said sluices and drains in the said second count mentioned, and of using and applying, as of right and without interruption, for and to other and different purposes and uses than the purposes and uses of condensing the steam used for working the said engine in the said second count mentioned, to wit for and to the purposes and uses of supplying the boilers of the said engine in the said second count mentioned with water, and of generating steam for working the said last mentioned engine, and of heating the said mill in the said second count mentioned, and of cleansing the said boilers, and of supplying with water a certain cistern, to wit a cistern on the roof of a certain engine house on the said lands in this plea aforesaid, such quantities of water as were from time to time necessary and required by the said occupiers for the time being of the said lands, mill and steam engine in this plea mentioned for the said several purposes and uses in this plea in that behalf aforesaid, as and when the said last mentioned quantities were necessary and required for the said several last mentioned purposes. The plea then stated that defendant, at the times when &c., being such occupier &c., and so entitled &c. as in this plea aforesaid, and having, at the several times when &c., occasion &c. to draw and use a large quantity of water, to wit 100,000 tons of water, for the purposes and uses for which he was at the said

Volume XVIII. several times when &c. in the said second count mentioned so entitled to draw and use the same as in this plea aforesaid, being other and different purposes and uses from and than the sole purpose of condensing the steam used for working the said engine in the said second count mentioned, to wit for the purposes and uses in this plea in that behalf aforesaid, the said last mentioned quantities being, at the said several times when &c., in the said second count mentioned, quantities necessary in that behalf and required by the defendant so being such occupier as in this plea aforesaid, for several purposes in this plea in that behalf aforesaid, being, at the said several times when &c., quantities more than sufficient for supplying the said engine in the said second count mentioned with water for the sole purpose of condensing the steam used for working the said last mentioned engine, drew from and out of the said cut of the plaintiffs in the said second count mentioned, to wit by and by means of the said sluices and drains in this plea aforesaid, the said last mentioned quantities of water, to wit the said 100,000 tons of water, for the said several purposes for which the same were then, to wit at the said several times when &c., so necessary and required as in this plea aforesaid; and then, to wit at the said several times when &c., in the said second count in that behalf mentioned, used and applied the same for the said several last mentioned purposes: which are the same several supposed grievances &c. Verification.

Replication to plea 4. That defendant and all occupiers &c. have not, nor has each of them, whilst &c., as right &c., for and during the full period of twenty years &c. had, used, exercised and actually enjoyed &c., nor oug-

ROCHDALE
Canal
Company
v.
RADCLIFFE.

Queen's Bench.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

Defendant at the times when &c. of right to have had &c. for himself and themselves respectively, whilst occupier and occupiers of the said lands, mill and steam engines in that plea aforesaid, the right, privilege and easement of drawing from time to time, as of right and without interruption, from and out of the said cut in the said second count mentioned, through and by means of the said sluices and drains in the said second count mentioned, and of using and applying, as of right and without interruption, for and to other and different purposes and uses than the purposes and uses of condensing the steam used for working the said engine in the said second count mentioned, to wit for and to the purposes and uses of supplying the boilers of the said engine in the said second count mentioned with water, and of generating steam for working the said last mentioned engine, and of heating the said mill in the said second count mentioned, and of cleansing the said boilers, and of supplying with water the said cistern, such quantities of water as were from time to time necessary and required by the said occupiers for the time being of the said lands, mill and steam engine in that plea mentioned, for the said several purposes and uses in that plea in that half aforesaid, as and when &c., in manner and form Conclusion to the country. Issue thereon.

The issues of fact were tried before Williams J., at the Liverpool Summer Assizes, 1851. It appeared that defendant was lessee of premises (a) used for the purpose of cotton spinning, and consisting of *The Old Mill*, erected in 1823, and *The New Mill*, an additional building, erected in 1829. The land on which they

(a) Described in the lease as "All those two cotton mills or factories called *The Old Back Mill* and *New Front Mill*."

Volume XVIII. stood extended from the canal to *Richard Street, Rochdale*
1852. the Old mill abutted on the canal, and the New

**ROCHDALE
Canal
Company**
v.
RADCLIFFE. *Richard Street.* They adjoined each other, and communicated by doors. Each mill had its own boilers & its own steam engine; the Old mill a 30 horse power, the New a 60. Machinery in one was worked by power from the other. Water was drawn from the canal by drain for the purposes of the Old mill more than twenty years before the commencement of this action; and, while the New mill was built, the canal water was taken for the purposes of that mill also, being carried into it by prolongation of the drain. The water continued to be thus taken, for the uses of both mills, down to the commencement of this action; the user at the New mill having then continued for only nineteen years and half. The purposes to which the water was applied were those stated in the plea, except that there was no allegation, as there alleged, any cistern "on the roof" of an engine house, though there were cisterns in and about other parts of the engine house in each mill, drawing their supply of water from the canal in the manner above stated.

It was contended on behalf of the plaintiffs that Old and New buildings constituted only one mill, and therefore that the prescription, as pleaded, was not made out by the proof; the mill described by the evidence differing in local situation from that described on record, and having been, in part, erected within twenty years; and that the use of the water for the new part of the mill was not had openly or as of right. A further, that, the defendants having made it part of their prescription that they should have water for supplying a cistern on the roof of a certain engine house, where

*Queen's Bench.
1852.*

no such cistern was proved to exist, the prescription altogether failed.

Williams J. left it to the jury to say whether the buildings constituted one or two mills; and whether or not the water had been used as of right; explaining to them what amounted to such user. The jury found that there was one mill only; and that the water was used as of right. The learned Judge then directed a verdict for the plaintiffs, reserving leave to move that a verdict for the defendant, or a nonsuit, might be entered.

*ROCHDALE
Canal
Company
v.
RADCLIFFE.*

Watson, in *Michaelmas* term, 1851, obtained a rule nisi accordingly.

Knockles, Tomlinson and Cowling now shewed cause (a). The prescription is in respect of defendant's "lands, mill and steam engine;" the verdict is that the whole forms one mill; and, upon the evidence, part of that mill has not existed twenty years. The New mill is identified as a part of the establishment in question by the words of the plea "situate" &c. in "*Richard Street*," upon which place the New mill abuts. If a prescription be pleaded, though a more extensive one than was necessary for the defence, it must be traversed by the plaintiff, and sustained by the defendant, in its whole extent. The law on this subject is fully stated by *Maulk* J. in *Peter v. Daniel* (b). In *Drewell v. Towler* (c) the plaintiff alleged a right, as tenant of a messuage, to the easement of hanging linen to dry on a certain close; the right proved was not general, as pleaded, but only that of hanging out linen of the tenant's own family; and it was held that the claim

(a) Before Lord Campbell C. J., *Wightman* and *Erlé* Js. *Crompton* J. took no part in the hearing or decision, having been counsel in the cause.

(b) 5 *Com. B.* 568. 577.

(c) 3 *B. & Ad.* 735.

Volume XVIII.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

failed altogether, because "the right claimed by the plaintiff" was "larger than that proved." By stat. 34 G. 3. c. 78. s. 113. (a) the water which, under the clause, owners of certain lands may draw off for the sole purpose of condensing steam is to be returned into the *Rochdale Canal* (allowance being made for inevitable waste in condensing); it is there appropriated to the public right of navigation given by sect. 104 (b); and it passes into the canal of the Duke of *Bridgewater* (c), in which the public have a paramount interest, as appears *Rex v. Trafford* (d); and the Company are, so far trustees for the public. The defendant, who sought to abridge these public rights, was bound to state expressly the grounds of such a claim, and the purposes, beyond those mentioned in the Act, for which he is entitled, twenty years' prescription, to detain the water: and cannot make any part of this statement immaterial by prefixing a videlicet. The purposes alleged are: 1. To supply and cleanse the boilers of an engine which is supposed to have existed twenty years; the proof is that the water was taken for the boilers of one such engine but also for those of another engine which has not existed twenty years: 2. To heat a certain mill; but

(a) This clause is set out at length in *Rochdale Canal Company v. King*, 14 Q. B. 122, note (a).

(b) Stat. 34 G. 3. c. 78. s. 104. enacts: "That all persons shall have free liberty with horses, cattle, and carriages, to use the private roads and ways, belonging to the said Company of proprietors, (except the towing paths), and with boats, barges, and other vessels, to use the said canal and cuts, for the purpose of conveying coals and all other goods and things, and to use the wharfs and quays" &c., "and the said towing paths" &c., "upon payment of the rates hereinbefore granted, and subject to the rules and regulations which shall be from time to time made by the said Company of proprietors by virtue of the powers herein granted."

(c) See p. 312, post.

(d) 1 B. & Ad. 874. *Venire de novo* awarded in Exchequer Chamber *Trafford v. The King*, 2 Cro. & J. 265. S. C. 2 Tyr. 201., 8 Bing. 204.

Queen's Bench.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

the greater part of that mill, according to the evidence, has been erected only nineteen years: 3. To supply a certain cistern, to wit a cistern on the roof of a certain engine house; but, supposing a cistern of the kind to have existed twenty years, there is not, according to the proof, any such cistern on the roof of an engine house.

This is not a case in which the allegations of a plea can be separated and the verdict entered distributively according to *Reg. Gen. Hil. 4 W. 4. Pleadings in Particular Actions*, V., 4, 5, 6 (a). Those rules apply where the right is distributively alleged, as a right to pass and repass with carriages and cattle, and to pass and repass on foot; or a right to depasture with horses and to depasture with sheep. Here one entire right is alleged, though for several purposes. [Lord Campbell C. J. mentioned *Ricketts v. Salwey* (b).] It would be necessary here to distribute the right, which cannot be done in such a case. In *Higham v. Rabett* (c) the defendant in trespass justified, alleging a general right of way, on foot and with horses and carriages, over plaintiff's close; the right proved was only to cart timber over the close: and the Court of Common Pleas held that the prescription, not being proved as laid, failed altogether, and that the verdict could not be entered distributively.

The present case is that of a prescription consisting of a single claim, and laid too extensively: as if a right were alleged in respect of ten houses, and proved in respect of nine only. In *Bower v. Hill* (d) the plaintiff claimed right of way to a watercourse by reason of his possession of a close: the close, which abutted on the watercourse, had been parcel of the *King's Head Inn* and yard, and

(a) 5 B. & Ad. 2.

(b) 2 B. & Ald. 360.

(c) 5 New Ca. 622.

(d) 2 New Ca. 339.

Volume XVIII. the way had, during that time, been used for purpose
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

connected with the occupation of these premises generally; but the plaintiff's close had been severed from the other property; and it was held that he, now holding only part of the premises to which the prescription has attached, could not claim the way "by reason of his possession of a close of land, from the said close to" the watercourse. *Rogers v. Allen* (*a*) is a case of the same class. In such cases, if the party prescribing could succeed, the verdict would be evidence for him, on subsequent occasion, of more extensive rights than he really had. The claim here could not be apportioned without making a new plea for the defendant. There is not on the record any issue of which part could be found for him. [Wightman J. He alleges a right to take the water, and a taking, for several purposes: you say, that if one of those was a purpose for which he could not take it, his plea fails.] If the Old and the New mills have been made one in such a sense that neither can now be distinguished from the other, it may be that the right which existed as to the Old mill ceases altogether according to the suggestion of this Court in *Alla Gomme* (*b*). It was intimated, in moving for this that the proper course would have been a new amendment: but the plaintiffs do not contend that the defendant used the water for other purposes than mentioned in the plea; the charge is that, using those purposes, he was not justified in so doing; the evidence bears out this.

Watson, Willes and Spinks, contra. The plaintiffs

(*a*) 1 *Can. 309* 313.

(*b*) 11 *A. & E.* 7

Queen's Bench.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

in respect of a mill was supported by the evidence. The defendant had that which completely answered the description of a mill, as given in the plea, for more than twenty years before action brought: and the right in respect of that mill was not lost because he added something to it. No claim appears by the record for anything of which there has not been a twenty years' user: and the real claim on which the defendant stands could not have been otherwise pleaded than it is here. [Wightman J. The jury find that the New and the Old part make one mill.] Unity of ownership is not to be confounded with unity of subject matter. There is one mill without the New part. If all that is new were burnt, the description in the plea would still be correct. The words "situate" in "*Richard Street*" do not alter this view of the case: that description is applied to the "land." If the plea does not point out with sufficient particularity the very premises to which the prescription attaches, the defect arises from the manner in which they are described in the second count: "lands," and "a certain mill and a certain steam engine." The plea could but follow that description. If the count had mentioned two mills or two engines, the defendant might have pleaded accordingly. It is observable that the second count has the words (adopted in the plea) "within the distance of twenty yards from the said cut," which point distinctly to the Old mill. [Lord Campbell C. J. It cannot be meant that the whole premises spoken of there are within twenty yards. Surely the mill comes within twenty yards if any part of it does so. Must not all parties here be supposed to use the common language of mankind, and call the whole establishment a mill? A mill of this kind is a manufactory, which

his plea, as was done in *Knight v. Woore* (*a*), where defendant pleaded a right of way to fetch water and and the right was proved as to water but negatived goods. The same application of the General rules,

RADCLIFFE.

W. 4. Pleadings in particular actions, V (*b*), was in *Giles v. Groves* (*c*), where the plaintiffs claimed of ferry to and from a place, and proved it only to ace. [Wightman J. There the plaintiffs, by their ion, which the defendant altogether denied, were d to a verdict as to so much of the right as they l. Here you answer the declaration by alleging ou did the act complained of in exercise of several and, as to one, your evidence fails.] If the allega- right is taken distributively, the defendant may avail lf of the plea of Not guilty as to the cistern which rs not to exist. [Wightman J. Your fourth plea s a taking, for several purposes, and, among them, e use of such a cistern; which is not proved. So of the declaration, therefore, as applies to that g is confessed and not answered; and there must minal damages at any rate.]

Cur. adv. vult.

rd CAMPBELL C. J., in the same term (*April 21st*), red the judgment of the Court.

one of opinion that on the fourth plea to the

*Volume XVIII.
1852.*

ROCHDALE
Canal
Company
v.
RADCLIFFE.

defendant, except in as far as the plea alleges that the water taken from the canal without the authority of the Act of parliament was used for the purpose of supplying with water a cistern on the roof of the engine house.

The jury have found that the water as actually used for twenty years was used as of right. It was used for all the purposes alleged in the plea, except for the cistern; and, if the use had extended to this, we should have thought the verdict on the fourth plea ought to have been entered generally for the defendant. Although the defendant was in the occupation of what has been called the New mill, which had not been erected twenty years before the cause of action accrued, and he had used the water in an engine erected there within twenty years, we think that the defendant sufficiently proved the allegation in his plea, of his possession of a mill and a steam engine, by his possession of the Old mill and the steam engine mentioned in the second count; and that he sufficiently proves the allegation of the use of the water for the first four purposes, by his having used it for those purposes in the Old mill for more than twenty years. If the plaintiffs meant to rely on the unlawful use of the water for the engine erected within twenty years, they ought to have new assigned.

On the part of the plaintiffs it is further contended that, as the defendant failed to prove the use of the water for the purpose of the cistern, the verdict ought to be entered against the defendant on the whole plea because it is said that the plea is entire. But we think that, according to the authorities which have been referred to, the issue upon the fourth plea may be applied distributively to the alleged purposes for which the water was used during the period of twenty years.

and that, part of the purposes being proved, pro tanto the verdict must be entered for the defendant. But, as he has admitted that *some* of the water which the plaintiffs alleged and proved he took was taken by him for another purpose than those which he has proved, the verdict will stand for the plaintiffs for nominal damages.

This will still leave the question open, upon a motion for judgment non obstante veredicto, whether the plea be good which alleges a use of the water beyond the purposes mentioned in the Act of parliament.

Rule accordingly.

The Court, when granting the rule nisi to enter a verdict for the defendant, had reserved leave to the plaintiffs to move, if it should become necessary, for judgment non obstante veredicto; and a rule was now granted, to shew cause why such judgment should not be entered as to so much of the issue upon the fourth plea as had been decided in favour of the defendant. On a later day of this term (*May 3d*),

Watson, Willes and Spinks shewed cause. The ground of motion is that the defendant by his fourth plea asserts a right in the occupiers of his land and mill to take, not surplus water for condensing, but such quantities of the water, generally, as were necessary and required by the said occupiers for the purposes of their mill, as and when such quantities were so necessary and required; that this right is claimed, under stat. 2 & 3 W. 4. c. 71. s. 2., by Prescription, implying a grant; and that the proprietors of the canal could not make such a grant consistently with the statutes from which they derive their

Queen's Bench.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

Volume XVIII. powers. And reliance is placed on stat. 34 G. 3. c. 78. s. 113. (*a*), and 46 G. 3. c. xx. s. 23., local and personal, public (*b*), as shewing that the Legislature permitted the withdrawing of water from this navigation for the purpose solely of condensing steam, the water, after such user, to be returned into the canal for the benefit of the navigation. But the Company's power to grant the water is not so limited. They do not hold the canal under a mere trusteeship like that of a public road. They are proprietors of an undertaking, useful to the public, but from which they derive a benefit in the form of tonnage dues which they are empowered to levy (*c*). The water is theirs, subject only to the use by others in the particular modes recognized by the Act of parliament. [Lord Campbell C. J. Is not the canal made a public highway?] Nothing obliges the Company to keep it up, if it proves unprofitable. As long as they do so, a limited duty arises, which is pointed out by Tindal C. J., delivering the judgment of the Exchequer Chamber in *The Lancaster Canal Company v. Parnaby* (*d*): "The Company made the canal for their profit, and opened it to the public upon the payment of tolls to the Company: and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." Subject to that restriction, such a Company may grant the water for any purpose: and the only

(*a*) 14 Q. B. 122, note (*a*).

(*c*) 34 G. 3. c. 78. s. 95.

(*b*) 14 Q. B. 124, note (*a*).

(*d*) 11 A. & E. 223. 242.

Queen's Bench.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

question here is whether, at the time of the alleged misfeasance, they could grant it for other purposes than that of condensing. In *Rochdale Canal Company v. King* (a), where rights of this Company with respect to the water were under consideration, it was suggested that the drawing off water as in the present case did not appear to cause any private damage to the Company for which they could bring an action: but this Court held otherwise. *Coleridge* J., after commenting upon the words of stat. 34 G. 3. c. 78. s. 113. and stat. 46 G. 3. c. xx. s. 23., said: "The water, then, having been used by the defendants for illegal purposes, the general principle applies, that, although no appreciable damage may be sustained, in the particular instance, by the wrongful act, yet, as the repetition of such an act might be made the foundation of claiming a right to do the act hereafter, a damage in law has already been sustained, in respect of which an action is maintainable." And *Erle* J. said: "Such a Company has all the rights and remedies which an individual owner of private property has, unless the statute contains some provision to take them away. Then the question is, could an individual owner of private property sue under the circumstances? I am clearly of opinion that he could. It is said that the Company could have no property in the water: perhaps not in the identical passing atoms; but they had in the flow, the *flumen aquæ*." The plaintiffs obtained judgment in that case both in this Court and in the Exchequer Chamber; and, the grievances being continued, they moved the Court of Chancery for an injunction; and on that occasion (b) Lord *Cranworth*

(a) 14 Q. B. 122.

(b) *The Rochdale Canal Company v. King*, 2 Sim. N. S. 78.

Volume XVIII. V. C. thought, with the common law Courts, that the plaintiffs had suffered a disturbance of right for which

1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

they had a claim to compensation, subject only to the question, raised before him, whether the claim had not been waived by acquiescence. [*Erle* J. You argue that the Company, having a right to turn these waters into their canal for the purpose of keeping a flow, may therefore sell them absolutely if they think fit.] Subject to the purposes of navigation, they have a right to take the water and to dispose of it. The right to the water must be in some one; and they have the same property in it as they would have in a stream of natural water under the same circumstances. *Magor v. Chadwick* (a) shews that no distinction can be made. There is nothing in the Company's local Acts inconsistent with such a right. If a railway company found something in the soil over which their line was carried, which might be made profitable to themselves or to grantees without hindering the traffic, they might use or grant it; and this is the same case. It may be argued here, on the authority of *Wood v. Waud* (b), that the use of an artificial stream of water cannot be the subject of such a right as might be matter of grant: but the decision there relates to a watercourse which is casual and which the landowners creating it are not obliged to keep up. The case, therefore, is not in point. [Lord Campbell C. You claim a right here, without any qualification, withdraw, for certain purposes other than condensing such quantities of water as were from time to time necessary.] The Court will not intend, after verdict, that the defendant claimed to withdraw it in such

(a) 11 A. & E. 571.

(b) 3 Exch. 748.

Queen's Bench.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

~~Quantities~~ as to impede the navigation. A plea of this kind ought to receive a reasonable construction, and such as may, if possible, sustain the allegation of right; *Manning v. Wasdale* (a), *Tyson v. Smith* (b). [Lord Campbell C. J. This plea might have been proved by evidence of a taking which would have interfered with the navigation.] Such proof was not necessary. The mere possibility of an abuse does not exclude the supposition of such a grant as is here relied upon. In *The Grand Surrey Canal Company v. Hall* (c) the proprietors of the canal were directed by statute to make and maintain bridges across the canal for the use of the adjoining landowners; they built a bridge for the use of persons occupying the lands of one *Rolls*: the question at the trial was, whether or not the bridge had become a highway by dedication; and it was argued that this supposition was rebutted by the Company's Act: but, the Act not expressly prohibiting a dedication, the Court held that it might be inferred from the evidence.

Tindal C. J. said, during the argument: "Why might not this Company dedicate the bridge? They might be answerable over to the proprietors at large, but there is no statute to restrain them." "They might have prevented the public from crossing the bridge; but if they build a bridge and allow persons to use it, why should not the usual consequences follow?" And, in his judgment: "I am not aware that there is any thing in the constitution of the Company, to prevent them from dedicating a way to the public, as other persons or

(a) 5 A. & E. 758.

(b) In K. B. 6 A. & E. 745. In Exch. Ch. (judgment affirmed) 9 A. & E. 406.

(c) 1 M. & G. 392.

Volume XVIII. corporate bodies may do. They are the masters of their
1852. own property; and though they may be answerable to
ROCHDALE Canal Company v.
RADCLIFFE. the rest of the proprietors for a failure of duty, I see
no reason why the public may not by user gain a right
of way against them, as well as against any other
individuals."

By the Prescription Act, 2 & 3 W. 4. c. 71. secta 2 and 5, the general averment, as made in this plea, of an enjoyment as of right during twenty years, is sufficient; and "any proviso, exception, incapacity, disability" &c., shewing the enjoyment not to have been of right, must be specially pleaded. In the absence of such plea, if the enjoyment could, under any circumstances, have been rightfully had, the Court will intend it to have been so. If the user might have been legal or might have been illegal, reference being had to the rights of the public over this canal as a highway, the illegality should have been replied. In a water running over private land, but subject to a public right of navigation, any subtraction of the water for private purposes, even the draught of it for cattle, may be a nuisance to the public; but the fact must be shewn in pleading. [Lord *Campbell* C. J. The declaration says "whereby the plaintiffs lost and were deprived of the said water." Is not that an allegation that the plaintiffs, who are trustees for the public, have suffered in that character?] Those are merely verba sonantia. The plaintiffs would limit the defendant to a user of this water for the purpose of condensing steam: but nothing on the record shews that the right of user for other purposes may not have been granted to a mill-owner on the defendant's land in the time of *Richard I.* [Erle J. Would not such right be subject to the provisions of stat. 34 G. 3. c. 78.?] Suppose

this were the case of a river, running through a populous country, and subject to a public right of navigation: it cannot be contended that every landowner on the banks, justifying under a prescriptive right to the use of water, must shew, in his pleading, that his exercise of the right did not injure the navigation. Reference may be made on the other side to the dictum in *Co. Litt.* 115. a. that "regularly a man cannot prescribe" "against a statute," but that does not apply where the claim of right is founded merely upon a twenty years' user since the statute.

Queen's Bench.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

Knowles (with whom were Tomlinson and Cowling), contra. The claim to withdraw this water for other purposes than that of condensing violates both public and individual rights, conferred by stat. 34 G. 3. c. 78. & 104(a). The privileges and duties of the Company with respect to the water were granted by that Act, and further extended and ascertained by stats. 39 & 40 G. 3. c. xxxvi. and 46 G. 3. c. xx. Their situation, under the several statutes, is that of an association upon which powers necessary to their undertaking are conferred, upon certain conditions; and, among these, that they shall keep open a passage for the public on the canal itself and upon the ways and wharfs adjoining, for which passage certain rates are to be paid; and these rates are to be the security for moneys which the Company are authorized to raise by mortgage, annuity, promissory notes, or otherwise (b). Another condition is that "the waste water of the said *Rochdale Canal*"

(a) Ante, p. 298, note (b).

(b) Sects. 4, 5, 6 of stat. 39 & 40 G. 3. c. xxxvi. (local and personal, public) were particularly referred to. And see stat. 34 G. 3. c. 78. s. 79.

sufficient to supply the said engine or engines with cold water, for the sole purpose of condensing the steam used for working any such engines;" and even this was subject to the proviso that a quantity of water equal to that taken, with the exception of inevitable waste, should be returned into the canal on each day when the engine was used, "so that no obstruction shall arise therefrom to the said navigation." Subject to this condition, every landowner within twenty yards of the canal might take the water for the purpose of condensing only. The present action is brought expressly for violating the condition of the Act in this respect. The declaration refers to the Act of parliament, and alleges that the defendant had a mill and steam engine upon land within twenty yards of the canal, but that he diverted water from the canal in greater quantity than was necessary for condensing steam, and for other purposes than condensing steam. The defendant pleads a justification to both these breaches, alleging a prescriptive right "of drawing from time to time" "from and out of the said cut," "and of using, and applying" "for and to other and different purposes and uses than the purposes and uses of condensing the steam used for working the said engine," to wit, the purposes and uses "of supplying the boilers of the said engine" "with water, and of generating steam for working the said last mentioned engine, and of heating the said mill" "and of cleansing the said boilers," "such quantities of water as were from time to time necessary and required" by the occupiers of the mill and engine "for the said several purposes and uses," "as and when" they were so required. That is a claim, by supposed grant, to take more water than the Act allows; as much, that is, as may be necessary for

Queen's Bench.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

Volume XVIII. the several purposes stated, and whatever the consequences may be to the navigation. Such a plea, even if confined to the surplus water, would be bad, because

~~ROCHDALE
Canal
Company
v.
RADCLIFFE.~~

Duke of *Bridgewater* has a right to that surplus; but it is not so confined. Mr. *Watson* was obliged to contend that the Company might, if they thought proper, stop the navigation altogether, or grant away so much of the water that the use of the canal by boats and barges might be prevented. But it is impossible to say that they have such a power. The water is not the Company for such purposes. They have a right only to use it; to pass the surplus to the Duke of *Bridgewater*, and apply to the uses of the canal the water which is requisite for those uses. If they had made a grant of the water in the terms of this plea, such a grant would have been ultra vires, and bad; their successors would not have been bound by it; and it could not have been effectual! pleaded in bar to the present declaration.

COLERIDGE J. I am of the same opinion. The foundation of the fourth plea is a supposed grant, the existence of which is to be shewn by acts of user. But, if the acts of user would not be legal, the grant cannot be inferred from them. The Company here are not the owners of the water, but trustees for the public, under a very limited trust. They are bound to apply all the water that may be required to the purposes of the navigation; they are also bound to allow so much as is wanted for the particular use (specified in stat. 34 G. 3. c. 78.) of the mill owners within a certain distance of the banks. The Act last cited at the Bar (*a*) provides

(*a*) 39 & 40 G. 3. c. xxxvi. s. 40.

Queen's Bench.
1852.

ROCHDALE
Canal
Company
v.
RADCLIFFE.

even for the surplus water; otherwise there might have been some foundation for an argument with respect to this on the part of the defendant. As the case stands, either the water which has been diverted is within the specified uses, and then no grant could have been made of it, apart from those uses; or, at any rate, it was surplus water which the Company were bound to transmit to the canal of the Duke of Bridgewater, and therefore could not grant. Allusion has been made to some expressions which I am said to have used in *Rochdale Canal Company v. King* (*a*); but these must be taken with reference to the facts which were then before the Court, and will not affect the decision of this case.

ERLE J. This is a claim to impose a servitude upon the canal by virtue of a twenty years' user. The party seeking to establish such a claim must shew a grant by a person capable of making the grant relied upon. Now the grant here is by persons having no distinct ownership of the water, but entitled only to the flow of it for the purposes of the navigation, and having no right to the surplus. If it had appeared, by direct evidence, that the Company had made a grant to the purport now supposed, setting out their title, that grant would have appeared to be against the right of the public, and void upon the face of it. The twenty years' user, therefore, could establish no right (*b*).

Rule absolute.

(*a*) 14 Q. B. 122.

(*b*) Crompton J. took no part in the decision, having been counsel in the cause.

Volume XVIII.
1852.

Saturday,
April 17th.

SHEPHERD *against* HODSMAN.

Sect. 57 of stat. 3 G. 4. c. 126. provides that "all contracts and agreements to be made or entered into for the farming or letting the tolls of any turnpike roads, signed by the trustees" "letting such tolls," "or by their clerk or treasurer," shall be valid, "notwithstanding the same may not be by deed or under seal."

Held: 1., That an agreement for the letting of tolls, signed by the clerk to the trustees, and stating that by that agreement he, "on behalf of the trustees," did "agree to let," and the lessee did agree to take, the tolls and toll house for two years, was made according to sect. 57; the clerk having authority, by the statute, to contract, as well as to sign, on behalf of the trustees.

2., That stat. 8 & 9 Vict. c. 106. s. 3., which provides that "a lease, required by law to be in writing, of any tenements or hereditaments" shall be void at law unless made by deed, does not apply to agreements for the lease of tolls under stat. 3 G. 4. c. 126.

(a) 9 G. 4. c. lxxviii. (local and personal, public).

behalf of the said trustees, did agree to let, and did thereby let, and the said *R. N.* did agree to take, and did thereby take, to farm the said tolls and duties," "together with the toll house and appurtenances," for the term of two years, at the yearly rent as aforesaid. And the said *R. N.*, *G. G.* and defendant "did, and each and every of them did, thereby agree with the plaintiff, as such clerk as aforesaid," that they or some one of them, their heirs &c., would pay the said yearly rent during the said term: "and, the said agreement having been so made and signed, the defendant, in consideration of the premises, promised the said trustees" to perform and fulfil the said agreement. Breach, non-payment by *Norris* of six months' rent, and refusal by defendant to pay the same.

Queen's Bench.
1852.

SHEPHERD
v.
HODSMAN.

Plea, Non assumpsit. Issue thereon.

On the trial, before Lord *Campbell C. J.*, at the *York Spring Assizes*, 1852, it was objected, on behalf of the defendant, that the agreement recited in the declaration was void, inasmuch as, though it recited the putting up to auction and the letting of the tolls as prescribed by stat. 3 G. 4. c. 126. s. 55., the agreement should have been made by the trustees themselves, sect. 57 authorizing the clerk to sign on their behalf, but not to contract. The Lord Chief Justice overruled the objection; and a verdict was given for the plaintiff, leave being reserved to move to enter a nonsuit.

Watson now moved accordingly. First, the agreement to let the tolls is not made in the manner prescribed by stat. 3 G. 4. c. 126. Sect. 57 of that statute provides "that all contracts and agreements to be made or entered into for the farming or letting the tolls of any turnpike roads, signed by the trustees or commissioners letting

Volume XVIII. such tolls, or any two or more of them, or by their ~~clerk~~
1852. or treasurer, and the lessee or farmer, and his ~~sureties~~,
of such tolls respectively, shall be good, valid ~~and~~
effectual, to all intents and purposes, notwithstanding
the same may not be by deed or under seal." That
clause enables the clerk to sign the agreement on behalf
of the trustees or commissioners, but not to agree ~~on~~
their behalf. The trustees or commissioners only can
be the parties contracting with the lessee. *Bell v. Nixon* (a)
and *Lee v. Nixon* (b) shew how strictly the provisions
of the statute, as regards the form of such agreements, are
to be construed. It was held in *Pitman v. Woodbury* (c)
that, where a lease is not executed by the lessor, the
lessee, although he may have executed, is not bound
the covenants made by him in consideration of the lease.
Here the commissioners, who are the real lessors, have
not executed: and the action therefore does not lie.

Secondly, such an agreement as this should now b
under seal. Stat. 3 G. 4. c. 126. s. 57. declares that i
shall be good notwithstanding it may not be under seal: but it has been since enacted by stat. 8 & 9 Vict. c. 106. s. 3. that "a lease, required by law to be in writing, of any tenements or hereditaments," shall be void at law, unless made by deed." [Lord Campbell C. J. Stat. 8 & 9 Vict. c. 106. is "An Act to amend the law of real property." Can the provisions of that Act apply to a lease of turnpike tolls under stat. 3 G. - - 4. c. 126.?] Tolls certainly come under the denomination of "hereditaments." And here the toll house is lessable which is real property and a "tenement."

Lord CAMPBELL C. J. I am of opinion that there ~~is~~

(a) 9 Bing. 393.

(b) 1 A. & E. 201.

(c) 3 Exch. 4.

Queen's Bench.
1852.

SHEPHERD
v.
HODSMAN.

should be no rule. A statutory mode has been prescribed for making leases of this description. The statute authorizes the trustees or commissioners to let the tolls to the highest bidder, under certain conditions, at a public meeting; and declares that the agreement for such letting is to be signed by the trustees or commissioners, or their clerk or treasurer. Here it is signed by the clerk; and the agreement recites the whole of the transaction, which took place according to the provisions of sect. 55; and it states that the tolls were taken by *Norris* as lessee, and that the defendant became his surety. I think, therefore, that the agreement is made in perfect compliance with the provisions of sect. 57. As to the objection that such agreements ought now to be under seal, I think it would be strange to hold that the provisions of stat. 8 & 9 Vict. c. 106., which was passed for the purpose of amending the law of real property, were intended to embrace statutory agreements made under stat. 3 G. 4. c. 126. Indeed, if we were to construe the latter statute strictly, we should find that it does not require the lease itself of the tolls to be in writing at all, but only that the agreement for such lease, which operates, of course, as a lease, must be in writing: so that stat. 8 & 9 Vict. c. 106. s. 3. could not apply. It applies, in fact, only to such leases as are required to be in writing by the Statute of Frauds; and not to agreements for leases of tolls under this Act.

WIGHTMAN J. I am of opinion, as regards the first objection, that the agreement is in compliance with stat. 3 G. 4. c. 126. s. 57. The trustees are, by sect. 55, to be the parties who actually let the tolls: but the statute does not enact that the contract for letting them must

Volume XVIII. be made by the trustees in person. Under sect. 57, 1852. the clerk may clearly make the contract on behalf of the trustees. I am further of opinion that stat. 8 & 9 Vict. c. 106. s. 3. does not apply to agreements for the lease of tolls under stat. 3 G. 4. c. 126.

ERLE J. It appears to me that the letting of the tolls in this case has been according to the provisions of sect. 55, and that the agreement for such lease has been recorded according to the provisions of sect. 57. Stat. 8 & 9 Vict. c. 106. does not apply to agreements of this kind, which are not leases, although, when reduced into writing, they are to have the effect of leases.

CROMPTON J. By the statute, a parol agreement for ~~to~~ the lease of tolls, signed by the trustees or their clerk, is ~~to~~ to have the effect of an actual lease by the trustees. ~~—~~ Stat. 8 & 9 Vict. c. 106. s. 3. has no reference to agreements of this kind. In *Bell v. Nixon* (a) it was held ~~that~~ that, where two persons acted jointly as clerks to the trustees, the signature of one only was not sufficient; but ~~it was not disputed that they could, jointly, make the~~ agreement on behalf of the trustees. I think the agreement here is made in accordance with the provisions of sect. 57.

Rule refused.

(a) 9 Bing. 393.

*Queen's Bench.
1852.*

CHATFIELD *against* Cox.

*Tuesday,
April 20th.*

~~A~~ SSUMPSIT on a bill of exchange for 47*l*, drawn by one *Joseph Liddiate* on, and accepted by, defendant, and indorsed by the said *Joseph Liddiate* to plaintiff. There were also counts for interest and on an account stated.

First plea: That, after the making of the said bill, and after the accruing of the causes of action in the said counts mentioned, and before the commencement of this suit, to wit on &c., certain persons named *Cleaver* and *Watson* were indebted to defendant in the sum of 48*l*. 13*s*. 10*d*.; that it was thereupon agreed between plaintiff, defendant, and the said *C.* and *W.*, that defendant should relinquish and abandon all claim to, and exonerate and discharge the said *C.* and *W.* from, the payment to him of the moneys due and owing on the said bill, and from all causes of action in respect thereof; and that the said *C.* and *W.* should, on being required by plaintiff, deliver to him such parcels of Roman cement as he should require, to the value of the said sum of 48*l*. 13*s*. 10*d*., in lieu of paying defendant the said debt due to him from them; and that that debt, and also the debt and causes of action as to the said bill in the first count mentioned, should be taken as satisfied by the said agreement: That the said agreement was so made by defendant and the said *C.* and *W.* in satisfaction and

Defendant was indebted to plaintiff in 47*l*.; and *C.* & *W.* were indebted to defendant in 48*l*. By agreement between *C.* & *W.*, plaintiff and defendant, the following document was delivered to plaintiff:
 "To Messrs. *C.* & *W.*. I request you will supply Mr. *C.*" (plaintiff) "with such parcels of Roman cement as he shall require, to the amount of 48*l*. and charge to the account standing with you to my credit. *R. C.*" (defendant). Under this was written:
 "To Mr. *C.*" (plaintiff). "On the consideration above named we agree to supply to your order, when you shall require it, 48*l*. *C.* & *W.*"

Roman cement to the amount of 48*l*. *C.* & *W.*"
 Held, that this was an agreement relating to the sale of goods within the exemption in Schedule Part I. to stat. 55 G. 3. c. 184., and therefore did not require a stamp.

Volume XVIII. discharge of the said bill and causes of action in the
 1852. _____
 CHATFIELD
 v.
 Cox. _____
 the said first count mentioned; and that plaintiff accepted
 the said agreement in such satisfaction and discharge.
 Verification.

Replication, that the said agreement was not made
 and accepted in satisfaction and discharge of the bill and
 causes of action in the first count mentioned, modo et
 formâ. Issue thereon.

On the trial, before Lord *Campbell* C. J., at the
Middlesex sittings after last *Hilary Term*, the following
 document was put in by the defendant in support of the
 first plea.

“3, Wellington Square, Chelsea, December 1848—
 To Messrs. *Cleaver* and *Watson*.

Gentlemen, I have to request you will supply Mr.—
R. Chatfield with such parcels of Roman cement as he—
 shall require to the amount of 48*l.* 13*s.* 10*d.*, and charge
 to the account standing with you to my credit. Yours,

Robert Cox.”

Underneath was written:

“Elizabeth Bridge Wharf, Pimlico, December 1848.
 To Mr. *R. Chatfield*.

On the consideration above named we agree to supply
 to your order, when you shall require it, Roman cement
 of the best quality delivered within three miles at 1*s.* per
 bushel, to the amount of 48*l.* 13*s.* 10*d.*

Cleaver and Watson.”

This document was not stamped; and it was objected,
 on behalf of the plaintiff, that it required a stamp, not
 being an “agreement made for or relating to, the sale of
 any goods,” within the exemption contained in Schedule,
 Part I. of stat. 55 G. 3. c. 184. The Lord Chief Justice

admitted the document; and a verdict was given for the defendant, leave being reserved to move to enter a verdict for the plaintiff.

Queen's Bench

1852.

CHATFIELD

v.

Cox.

H. Hawkins now moved accordingly. This is not an agreement either expressly for, or relating to, the sale of goods. The transaction for which it provides is not a sale at all. [Lord Campbell C. J. It is a transfer for a pecuniary consideration, the consideration being the liquidation of the debt due from Cleaver and Watson to the defendant.] That cannot be considered as a sale; there is no bargain between the plaintiff and Cleaver and Watson. [Lord Campbell C. J. Suppose Cleaver and Watson had delivered the cement to the defendant himself, in satisfaction of his debt.] That could not be considered as a sale. Supposing the cement to have been delivered under this agreement, and that the defendant had nevertheless sued Cleaver and Watson for their debt to him, they could not have pleaded such delivery by way of set-off for goods sold and delivered. [Lord Campbell C. J. A guarantee to pay for goods to be supplied to a third person is an agreement relating to the sale of goods within the exemption of the statute.] That is an actual contract for the sale of goods: here no goods are bought or sold at all. [Lord Campbell C. J. But in the case of a guarantee the sale of the goods is not the direct object of the agreement.] It is the primary object; here, if there be any sale at all, it is a secondary object of the agreement, the primary one being the liquidation of Cleaver and Watson's debt to the defendant. In *Tileley on the Stamp Laws*, p. 48. (2d ed.), it is laid down that, "if the primary object of the writing be the sale of goods, the right to exemption

Volume XVIII. is not affected by reason of its containing a secondary or collateral matter, but it is otherwise where the proposition is reversed." *Smith v. Cator* (*a*) is an instance of the second of these two propositions. [Lord Campbell C. J. There the agreement was between principal and factor, not between vendor and vendee, as here.]

Lord CAMPBELL C. J. I am of opinion that the agreement is within the exemption of Schedule Part to stat. 55 G. 3. c. 184. It is an agreement relating to the sale of goods. No money was to be actually paid for the cement supplied; but it was to be delivered as a pecuniary consideration, namely, the liquidation of the debt due from *Cleaver and Watson* to the defendant. The agreement is, practically, for the sale of goods, ~~as much as a guarantee for the supply of goods which~~ are to be paid for with money. There can be no doubt that delivery of the cement, under this agreement, might be pleaded by way of set-off for goods sold and delivered in an action by the defendant against *Cleaver and Watson* for the amount of their debt to him.

WIGHTMAN J. The question whether an agreement of this description requires a stamp must be decided by the terms of the instrument itself. Here the agreement is, on the face of it, clearly an agreement relating to the sale of goods. It would clearly have been good evidence for a plaintiff in an action for goods sold and delivered and it is therefore good evidence for the defendant herein in support of the first plea.

ERLE J. I am of the same opinion. When a debt

(*a*) 2 B. & Ald. 778.

CHATFIELD
v.
Cox.

has goods to sell, and the creditor says, If you will *Queen's Bench.*
 deliver goods for me to the amount of your debt, I 1852.
 relinquish my claim in respect of it, that is an agreement
 for the sale of goods, and is within the exemption in CHATFIELD
v.
Cox.
 the Schedule, part I.

CROMPTON J. concurred.

Rule refused.

The QUEEN against The Dock Company at KINGSTON UPON HULL.

*Wednesday,
April 21st.*

ON appeal, at the *Hull Midsummer Sessions, 1851,* against a rate for the relief of the poor, assessed upon the appellants in respect of their docks situate in the parishes of *Holy Trinity* and *St. Mary* in the town of *Kingston upon Hull*, which parishes are united for the relief of the poor (by division into eight wards under a local Act), the Sessions confirmed the rate with costs, subject to the opinion of this Court upon a case, the material parts of which are as follows.

The appellants are the owners and occupiers of the docks and basins after mentioned, situated at the port of *Kingston upon Hull*, which, previously to the construction of the oldest of the said docks, was an ancient

The Hull Dock Company were proprietors of several docks, made at different times and under successive Acts of parliament. The docks communicated with each other and with the river *Humber*, and extended into several parishes. Every vessel paid a single toll, which became due on entry into the docks and was paid then,

or on clearance outwards; and she was entitled by such payment to go into any one or more of the docks at the will of her own master, or under the direction of the Company's harbour master, who had certain powers for regulating the position of vessels. All the payments, at whatever dock received, were carried to one general account.

Held that the poor rate upon so much of the docks as lay in any parish must be assessed, not according to the actual receipts in that parish, but to the proportion which the area of docks within that parish bore to the entire area of the docks. For that, in such a case, an assessment on the acreage principle was unavoidable; though an assessment on the basis of earnings within the parish is preferable where the nature of the case permits it.

Volume XVIII. port formed by the river *Hull*; a part whereof, adjoining
1852. the town of *Kingston upon Hull*, is known by the name

The QUEEN of *The Old Harbour*. The *Old Harbour* extends from

HULL Dock Company. a place formerly called *Sculcote Gote* to the mouth of the river, and is vested in the Mayor, aldermen and burgesses of the borough, who receive considerable dues in respect of vessels using the port.

In 1774, by stat. 14 G. 3. c. 56. s. 17., the appellants were incorporated as *The Dock Company at Kingston upon Hull*; and, by sect. 15, the Company were empowered to make the dock now called *The Old Dock*, most of the north part of which is in the parish of *Sculcoates*, and the south part is in the parishes of *Holy Trinity* and *St. Mary*. By sect. 22, the Company were from time to time to repair, maintain, support and cleanse the said dock and certain other works in the said Act mentioned, and by them to be provided by virtue of the Act. By sect. 25, the said dock and the works connected therewith were vested in the said Company. By sect. 42, in consideration of the great charges &c. of making the said dock and works and keeping the same in repair, certain rates or duties of tonnage were granted to the said Company for every ship or vessel (the King's ships of war and ships employed in His Majesty's service excepted) coming into or going out of the said harbour, basin or dock within the port of *Kingston upon Hull*, or unlading or putting on shore, or lading or taking on board, any of their cargo or any goods, within the said port, for every ton a certain sum of money, varying in amount (as in the said section is mentioned) according to the ports or places therein specified between which and the port of *Hull* the said vessels might come or go or trade; which

rates or duties were vested in the Dock Company. The time at which these rates or duties were directed to be paid is pointed out in the following terms: "and shall be paid at the time of such ship's or vessel's entry inwards, or clearance or discharge outwards, or, in case any ships or vessels shall not enter as aforesaid, then, at any time before such ships or vessels shall proceed from the said port, at the custom house in the said port; so as no ship or vessel shall be subject or liable to the payment of the said rates or duties, or any of them, more than once for the same voyage, both out and home, notwithstanding such ship or vessel may go out and return with a loading of goods or merchandize." (The case then referred to sects. 46—52, as to measurement of ships and collection of duties, and sect. 53, as to annual meetings of the Company and accounts to be rendered there, &c.) By sects. 67 to 70 the Guild of the *Trinity House of Kingston upon Hull* are empowered to appoint a dock master and assistants, with power to direct the mooring or removing of vessels.

The dock now called the *Old Dock*, with the quays and works mentioned in this Act, was constructed (*a*) within the statutory time. The entrance into this dock from the *Old Harbour* was through its basin, situate in one of the respondent parishes. The liability of the appellants to be rated in the parish of *Sculcoates* for so much of the said dock as lies in that parish was established in the Court of King's Bench in 1786 (*b*).

Stat. 42 G. 3. c. xci., local and personal public (passed in 1802), for making additional basins or docks at *Kingston upon Hull*, recites (sect. 1) the before mentioned

Queen's Bench.
1852.

The QUEEN
v.
HULL Dock
Company.

(*a*) Reference was made here and in other parts of the case to a plan.

(*b*) *Rex v. The Dock Company of Hull*, 1 T. R. 219.

Volume XVIII. Act and its provisions generally; and it authorizes
1852. and requires the said Dock Company to make The

The Queen

v.

Hull Dock

Company.

Humber Dock and basin. And by sect. 2 it is enacted: "That the said recited Act, and all and every the rates and duties, powers, authorities, provisions, regulations, clauses, penalties, forfeitures, matters, and things, therein and thereby given, granted, vested, levied, or to be executed" (except so far as they are altered &c. by this Act) "shall be and they are hereby declared to be in full force, as well in regard to the said additional basin or dock, and other works hereby directed or intended to be made, and for effecting all the other purposes of this present Act, as for the purposes of the said recited Act," as fully as if here re-enacted. By sect. 37 the Dock Company are to support and cleanse the *Humber* Dock. Sect. 58 gives power to purchase land for third dock, to meet the probable wants of the port.

In 1805, by stat. 45 G. 3. c. xlii., local and personal public, which was an Act to authorize the raising of money for carrying into execution the powers of the last mentioned Act, the docks and basins by the last mentioned Act (42 G. 3. c. xci.) directed to be made were, by sect. 12, declared to have extended to them the same rights and privileges which then belonged to the port of *Kingston upon Hull*; and they were to all intents and purposes to be deemed part of the said port. And it was declared that all vessels entering into or loading or unloading in the said docks or basins, and all goods, merchandize and other things which should be loaded or unloaded in or pass through the same, should be subject to the several regulations, and be liable to the several duties, to which they were or had been subject and liable in the port of *Kingston upon Hull*.

After this statute was passed, the *Humber* Dock and basin, and (after an interval of about twenty years) the *Junction* Dock, were completed according to the provisions of the two last recited Acts.

In 1844, stat. 7 & 8 Vict. c. ciii. was passed, which, after reciting stats. 14 G. 3. c. 56., 42 G. 3. c. xci. and 45 G. 3. c. xlvi., and that it would be expedient that the said Company should be authorized to make certain additional docks, enacted (sect. 1) "that the said recited ~~Acts~~, and all and every the provisions, rates, matters, and things" "therein respectively contained" (except as varied &c. by any of the said Acts or that Act), shall "be in full force and effect as well in regard to the present docks as the said intended new docks and quays, and all other the works to be made by virtue of and under this Act, and shall extend to this Act, and shall be in force with respect to this Act as effectually" as if herein re-enacted, and the recited Acts and this Act shall be construed together as one Act. By sect. 8 the Company were empowered to borrow money on mortgage of the rates and duties under the said recited Acts and this Act, or by bond. (The case then referred to sects. 66, and 67, which relate to the keeping of accounts of moneys received or expended on account of the Company by the Company or directors, and making and depositing copies of such accounts, as settled and allowed at the annual meeting of the Company in each year.)

By sect. 166 it was made lawful for the Company to construct a new dock on the eastern side of the Citadel at *Kingston upon Hull*, and also a branch dock at the western side of the *Humber* Dock and to the north of the railway terminus. By sect. 191 it was declared that these docks and the works respectively connected there-

Queen's Bench.
1852.

The QUEEN
v.
HULL Dock
Company.

Volume XVIII. with should be deemed to be in and within and be part
1852. of the port of *Kingston upon Hull*. By sect. 194 it is enacted: "That no vessel passing up or down the river *Humber*, without entering any of the docks, basins, or harbour, or not commencing or terminating her voyage at the port of *Hull*, shall be subject to the tonnage rates imposed by the said recited Acts or any of them, unless such vessel shall load or discharge any part of her cargo within that part of the river *Humber* which is within the port of *Hull*, and in that event such tonnage rates shall be payable and paid only in respect of the quantity of goods so loaded or discharged by such vessel". By sect. 195: "No vessel passing up or down the river *Hull* to from any place above the *Beer houses* there, without entering any of the docks or basins, shall be subject to the same tonnage rates, unless such vessel shall load or discharge any part of her cargo within the *Old Harbour* or within that part of the river *Humber* which is within the port of *Hull*, and in that event such tonnage rates shall be payable and paid only in respect of the quantity of goods so loaded or discharged by such vessel." By sect. 200: "If any vessel using the docks, whether the same shall have previously paid or been liable to tonnage rates or not, shall remain in the docks or any of them for a longer space of time than ten months, to be computed from the time of going into the dock or docks, there shall be paid and payable to the Company by the master or owner of every such vessel, according to the tonnage or burthen thereof, a further rate of one halfpenny per ton for every week during which any such vessel shall remain in the said dock or docks beyond the said period of ten months, in addition to the rates or duties of tonnage payable by virtue of the said recited Acts." By

The QUEEN
v.
HULL Dock
Company.

sect. 202 : "The several rates authorized to be taken by the recited Acts and this Act shall at all times be charged equally and after the same rate in respect of the same description of vessel and same description of goods upon the same voyage: Provided always, that a vessel proceeding from the said port of *Hull* to any other port or place and returning from such port or place to *Hull*, and a vessel first proceeding from any other port or place to *Hull* and returning to such other port or place, shall be considered as performing the same voyage." By sect. 232 a Dock and haven master is to be appointed by the Guild of the *Trinity House* in *Kingston upon Hull*, with proper assistants. By sect. 237, the Dock and haven master and his assistants have power to regulate the position, mooring, unmooring, berthing, placing or removing within the said haven and docks, or any of them, of any vessels entering into, lying in, or going out of, the same respectively, subject to any by-laws, to be made by certain Commissioners named in the said Act. And, by sect. 238, "whenever the dispatch of business shall be obstructed by reason of any vessel lying in the said docks, whether the cargo of any such vessel shall or shall not have been discharged, it shall be lawful for the Dock and haven master" (subject to any such by-laws) "to remove any such vessel from any one of the said docks into any other of the said docks into which the vessel can be removed without being taken into the river *Humber*." By sect. 250, vessels, after being discharged of their cargoes, are to be removed into such part of the docks as shall be set apart for light vessels.

Under the powers and provisions of this Act a branch dock, the dock now called *The Railway Dock*, has been completed at the western side of the *Humber* Dock and

Queen's Bench.
1852.

The QUEEN
v.
HULL Dock
Company.

Volume XVIII. to the north of the railway terminus, and was opened on 1852. 4th December 1846: and the dock on the eastern side of the citadel, now called *The Victoria Dock*, with its basin communicating directly with the *Humber*, has also been completed; and the same was opened on 3d July 1850.

The QUEEN
v.
HULL Dock
Company.

All the docks on the west side of the river *Hull* communicate with each other, and also with the river *Humber* to the south through the *Humber Dock Basin*, and with the river *Hull* or *Old Harbour* to the east through the *Old Dock* basin. The *Victoria Dock*, which is on the east side of the river *Hull*, communicates through its basin with the river *Humber* to the south; and it is also intended, and by the last recited Act required, to communicate with the river *Hull* or *Old Harbour* to the west by means of a cut or communication, which is not yet completed, but which is in the course of construction and is expected to be completed in about a year. Upon the completion of that cut or communication, vessels entering the *Victoria Dock* basin from the *Humber* will be able to pass through and use all the docks, and to return into the *Humber* by the *Humber Dock* basin, or vice versa. At present vessels entering the *Humber Dock* basin from the *Humber* can pass through all the docks except the *Victoria Dock*, into the river *Hull*, and through that river into the *Humber*, or vice versa.

The Dock Company maintain and repair all their docks and works: and in making such repairs their workmen are employed, and their materials, of which they have always a large stock in their yards of works, are used therein indiscriminately. No separate or distinct accounts are kept for the several docks, the whole of the expenditure in maintaining and keeping them in repair

Volume XVIII. instances were then given of vessels having discharged
1852. and taken in cargoes, partly in the *Humber* dock and
partly in the *Victoria* dock, and paid only one set of
tonnage dues: and it was added that a list was put in
evidence by the respondents wherein forty one vessels
appeared to have used both the Eastern and the Western
Docks with or without the *Old Harbour* in a similar
manner on the same voyage.) In thus using several docks
on the same voyage, the shipowners are governed entirely
by their own convenience as to which they will use first:
first using sometimes the Eastern Docks, sometimes the
Western, sometimes the *Old Harbour*. Tonnage dues
are received for vessels using the *Old Harbour* only: and,
since the decision of this Court, in *Regina v. The Dock
Company of Hull* (a), that the Dock Company are only
rateable to the relief of the poor for the dues paid by
vessels which come into and use any of their docks, and
not for the dues paid to them by vessels which enter the
port or use the *Old Harbour* but do not enter or use any
of the docks, a separate account of the dues paid by the
latter description of vessels has been kept. A separate
account could be kept of the vessels using the *Victoria*
Dock alone, or of vessels which leave that dock, or which
enter it, with goods laden (when the dues would first
attach). No account is kept of the amount of dues
received from vessels using more than one dock, or
which use the *Old Harbour* conjointly with any one or
more of the docks. The same rates attach whether the
vessels use one or more of the docks; and can be claimed
as soon as they enter any of the docks. The further
tonnage dues, payable for vessels remaining more than

The QUEEN
v.
HULL Dock
Company.

ten months in the docks, have always been payable generally and without regard to the question whether such vessels within that period have remained within one particular dock or set of docks. (An instance was here given.) But, by the above mentioned statute, 7 & 8 Vict. c. ciii. s. 200., these further tonnage rates are charged at the rate of one halfpenny per ton per week for every week during which any such vessels shall remain in the said dock or docks beyond the period of ten months.

Queen's Bench.
1852.

The QUEEN
v.
HULL Dock
Company.

It was admitted by the appellants that the sum of 525*l.* was to be taken as the amount of tonnage dues received by the appellants in respect of vessels which had used the *Victoria Dock* and basin alone from the opening of their dock in July 1850 to the end of that year without having entered or come upon the soil of any of the appellants' other docks or works, or of the *Old Harbour*. And it was proved that that sum was the amount of dues chargeable upon vessels which had used that dock only during the time just mentioned. It was also proved that the amount of dues received for vessels which have used the *Victoria Dock* and some of the other docks is greater than the amount of dues received for vessels which have used the *Victoria Dock* alone exclusive of the harbour. It was further admitted that the area of the docks and their respective basins situated within the parishes of *Holy Trinity* and *St. Mary*, consisting of the greater part of the *Old Dock* and all its basin, the whole of the *Junction Dock*, the *Railway Dock* and the *Hummer Dock* and basin, contained 4339 perches: That the area of the *Old Dock* within the parish of *Sculcoates*, contains 612 perches: and that the area of the *Victoria Dock* and its basin, within the parish of *Drypool*, con-

Volume XVIII. tains 724 perches, and, within the place alleged by the appellants to be extra-parochial, and called the *Garrison side*, 1769 perches.
1852.

The QUEEN
v.

HULL Dock
Company.

The net rateable value on which the appellants were rated in the rate appealed against had been fixed as follows. From the gross receipts of the appellants in respect of all their tonnage dues, according to their own return, for the use of all or any of their docks or the *Old Harbour*, were deducted, first the proper deductions usual in such cases, and then the amount of tonnage dues received in respect of vessels using the *Old Harbour* only. The balance, after making these deductions, was then divided into two parts, in the proportion which the area of the docks and basins situate within the parishes of *Holy Trinity* and *St. Mary* bears to the area of that part of the *Old Dock* which is situate within the parish of *Sculcoates*; and from the amount of this proportionate sum, in respect of the area of land in the parishes of *Holy Trinity* and *St. Mary*, the sum of 525*l.* was deducted for tonnage dues in the *Victoria Dock* only. The appellants were assessed in the rate appealed against upon the balance thus ascertained.

For about twenty years before the construction of the *Victoria Dock* and the railway dock, under the recited Act 7 & 8 Vict. c. ciii., the rateable value of the appellants' docks and basins was apportioned between the respondent parishes and the parish of *Sculcoates* in proportion to the areas occupied in each by the docks and basins situate therein respectively; but on the hearing of this appeal it did not appear in evidence upon what ground this arrangement for apportionment had been made.

Queen's Bench.
1852.

The QUEEN
v.
HULL Dock
Company.

The appellants contended that the entire rateable value of all their docks and basins, including the *Victoria* Dock and basin, ought to be taken jointly and then apportioned among the several parishes and places within which the same docks and basins are respectively situated, in proportion to the areas of such docks and basins respectively within such parishes and places. The respondents contended that both the rateable value and the area of the *Victoria* Dock and basin ought to be excluded in calculating and apportioning the rateable value of the docks and basins situated within the parishes of *Holy Trinity* and *St. Mary*. It was agreed that no other objection or question, whether of form or substance, should be raised by either side in the said appeal.

The Court held that the principle contended for by the respondents was right.

If this Court should be of opinion that the principle of rating contended for by the respondents was wrong, the Order of Sessions and the rates were to be amended as follows, &c. (The case then gave reduced estimates of rate for the *South Myton* ward, *North* ward, *St. Mary's* ward, *Whitefriar* ward and *North Myton* assessments respectively.) Otherwise, the order of Sessions and the rate were to be confirmed.

~~Watson and Archbold~~, in support of the order of Sessions. The question is, whether the Court should look at the whole receipts and whole acreage, and consider the Company rateable for their docks in *Holy Trinity* and *St. Mary* in the proportion which the area in those parishes may bear to the entire area of the docks; or whether the rate should be imposed,

Queen's Bench.
1852.

The QUEEN
v.
HULL Dock
Company.

there." So, here, the toll is earned by the dock into which the ship comes, though the ship might have had the benefit of that toll without entering the particular dock. Suppose the Company had docks at *Hull* and *London*, and the receipts went into one common fund, and the general management were vested in one set of officers: it would not follow that the docks at the two places could be rated according to acreage. [Lord Campbell C. J. If the Company had docks in the *Humber* and *Tyne*, and took one toll for the use of both, would not each dock be the meritorious cause? And why might not the acreage principle then apply? As to the payment, does it make any difference in such a case whether the dues are paid after use of the two docks, or prospectively, and when both may perhaps not be used? The case describes several docks as distinct from each other: but, if, instead of being called separate docks, the whole had been called one dock, would the facts have stood otherwise than as they now do? Rightman J. Is not this, in effect, one dock running into different parishes?] There are several distinct docks, under different Acts of parliament. As to any one, the question, under the Parochial Assessment Act, 5 & 7 W. 4. c. 96. s. 1., is, what is "the net annual value" of that dock in the rating parish. It is, the sum paid by the ships entering or leaving the docks for the right to use that dock within the parish. The series of docks here may be compared to a canal running through several parishes and earning tolls which are carried to a common fund: in that case, a vessel goes from one end to the other and pays accordingly; the rate is apportioned according to the amount actually

Volume XVIII. 1852. earned in each parish, and not by acreage. If the vessel does not pass along the whole line, the rate, so far as the earnings from that vessel are concerned, will be in proportion to the extent actually passed over; *Rex v. Kingswinford* (*a*). As was said by *Bayley* J. there: "If the profit arising from a given quantity of land vary in different parishes, the rate must vary in the same proportion." The rule acted upon in that case is supported by *Rex v. Woking* (*b*) and *Regina v. London and South Western Railway Company* (*c*). [Lord Campbell C. J. The Court has adopted the parochial earnings principle, wherever it could be applied. *Erle* J. In the case of a canal, persons do not pay for the whole if they only use part. Lord Campbell C. J. Here the benefit paid for is not obtained unless the vessel can use the whole of the docks. It is contemplated that she may want to go from one to another, picking up her cargo.] Suppose the Company had let the *Victoria Dock*, the principle contended for by the respondents is the only one which could have been applied in rating the lessee. That principle is supported by *Regina v. The Cambridge Gas Light Company* (*d*) and by *Regina v. London, Brighton and South Coast Railway Company* (*e*), where many of the cases are reviewed. [Lord Campbell C. J. In the case of the railway, if you pay from *London* to *Croydon*, that does not entitle you to go to *Brighton*; therefore the line from *London* to *Brighton* is not the meritorious cause of earnings: here the vessel, having once paid, may go to any dock, or be removed to

(*a*) 7 *B. & C.* 236.

(*b*) 4 *A. & E.* 40.

(*c*) 1 *Q. B.* 558.

(*d*) 8 *A. & E.* 73.

(*e*) 15 *Q. B.* 313.

The QUEEN
v.
HULL Dock
Company.

any at the will of the Dock master. *Erle* J. There is a potential use of the docks, which becomes an actual use upon entry.] Still, the question is, in what parish? The tolls are paid for the use of the Company's land laid out in docks. That land has been made very valuable in one parochial district, and much less so in others; the appellants seek to give an unfair relief to the former district by clubbing together the areas and values in all the districts.

R. Hall, with whom was *T. C. Foster*, contra, was stopped by the Court.

Queen's Bench.
1852.

The QUEEN
v.
HULL Dock
Company.

Lord CAMPBELL C. J. The appellants are entitled to our judgment. The decisions in *Rex v. The Dock Company of Hull* (*a*) and *Regina v. Hull Dock Company* (*b*), in which cases the question was merely rateability or non-rateability, do not assist us here. This Court has adopted the parochial earnings principle of rating wherever it was practicable; but we cannot do so where the whole subject of rate is one concern, and part of the land which makes the entire profits is in one parish and part in another. In such a case no principle can be adopted but that of acreage; we must see what proportion of the land lies in each parish, and allow the rate accordingly. Here we have one concern, constituting one source of profit: the toll is taken for the use of land in two parishes: it is received only in one; but the land in the other is the meritorious cause just as much as the land where the receipt is. The case of a railroad is quite different:

(*a*) 1 T. R. 219.

(*b*) 7 Q. B. 2.

Volume XVIII. there the payment is made, not for using the whole line
1852. but a section: the traveller cannot, for the money paid

The QUEEN
v.
HULL Dock
Company.

go beyond a given point: but in this case the ship having once paid, may go to any of the docks. All therefore, are the meritorious cause of profit, and the only principle of assessment is to ascertain how much of the entire area lies in each of the parishes.

WIGHTMAN J. The Court would here, as in other cases, adopt the parochial earnings principle if it could be applied: but it cannot. These docks are a system of compartments carried through several parishes: but they are virtually one dock, although so divided; and the payment is made for using that one dock, into whatever parishes it may extend. The case is just the same as if a single undivided dock lay in several parishes and in such a case the acreage principle must unavoidably be adopted.

ERLE J. These docks form one entire rateable subject matter; the profits accruing equally from the whole. The actual use of all or any depends merely upon the convenience of the party paying toll, or will of the Dock master. Then the rate in each parish must be proportioned to that part of the entire which is contained in each parish. In the case of *Hammersmith Bridge* (a) the bridge lay in two parishes, the toll was received in one only: but the value of occupation was an entire subject of assessment, and the Court said, was to be apportioned between the parishes. The rate must be amended.

(a) *Rex v. Burnes*, 1 B. & Ad. 113. See *Regina v. Hammersmith Bridge Company*, 15 Q. B. 369.

CROMPTON J. I am of the same opinion. The toll is paid on entering any one dock, not for entering that dock, but for the privilege of using the whole system of docks. The acreage principle, therefore, is the only one applicable.

*Queen's Bench.
1852.*

The QUEEN
v.
HULL Dock
Company.

Order and rate to be amended (a).

(*o*) See *Regina v. North and South Shields Ferry Company*, 1 E. & B. 140.

The QUEEN against The LEEDS and BRADFORD Railway Company.

*Wednesday,
April 21st.*

ACERTIORARI having issued in pursuance of the rule granted by the Court in this case (*Re Edmundson*, 17 Q. B. 67.), *R. Hall*, in last Hilary term, obtained a rule to shew cause why the order, removed under the writ, should not be quashed.

Stat. 11 & 12 Vict. c. 43.
(for regulation of proceedings before justices out of Sessions) enacts, by sect. 11, that, where a complaint shall be laid before a justice, on which he shall have authority to grant an order, such complaint shall be made within six calendar months from the time when the matter of complaint arose. By sect. 38, the

The order bore date 16th September, 1850, and recited a complaint made on the 13th of that month, of acts done in 1846 and 1847. It was agreed, in argument upon the present rule, that the cause of complaint in fact arose more than six calendar months before the passing of stat. 11 & 12 Vict. c. 43., "to facilitate the performance of the duties of justices of the peace out of Sessions," &c.

Held that a complaint, after the Act came into operation, upon matter which arose before, was barred by sect. 11, though six calendar months from the time when the matter of complaint arose had elapsed when the statute passed:

For, the Act having given time for preferring any such complaint before the limitation clause came into operation, no such injustice resulted from giving full effect to sect. 11 as would warrant the Court in putting upon it a restricted construction.

Volume XVIII. *Joseph Addison* now shewed cause. The Court decided, in *Re Edmundson* (*a*), that this was a case in which, according to stat. 11 & 12 Vict. c. 43. s. 11., the complaint ought to have been made "within six calendar months from the time when the matter of such complaint" "arose." But it was not brought to the notice of the Court that, in the present instance, six calendar months from the time when the matter of complaint arose had elapsed when the statute passed. The case therefore, was not one upon which the statute could take effect: for, if it did, it must relate back to the expiration of the six months. But, in *Gillmore v. Executor of Shooter* (*b*), a case on the Statute of Frauds, the Court would not allow "that the Act had a retrospect to take away an action to which the plaintiff was then entitled." *Ashburnham v. Bradshaw* (*c*) was a like decision, in principle, on the Mortmain Act 9 G. 2. c. 36. The authorities applicable to this point were much discussed in *Moon v. Durden* (*d*), where the general doctrine that statutes should be construed prospectively, not retrospectively, was recognized by the whole Court of Exchequer, and applied by the majority to the case then before them. If this Act had been intended to operate retrospectively, there would have been some express provision enabling parties to institute proceedings within a given time, so as to escape the limitation. Here the enactment of sect. 11 is peremptory, that "such complaint shall be made and such information shall be laid within six calendar months" &c.: no interval is specified in which proceedings may still be

(*a*) 17 Q. B. 67.(*b*) 2 Mod. 310. S. C., 2 (T.) Jones, 101.(*c*) 2 Atk. 36.(*d*) 2 Exch. 22.

taken. (*Addison* then proceeded to argue other points of the case.) [Lord *Campbell* C. J. We are most alarmed by the objection on sect. 11 of the statute. *Wightman* J. *Towler v. Chatterton* (a) is an authority against you; there *Gillmore v. Executor of Shooter* (b) was cited (from *T. Jones's Reports*) against the limitation; but the Court held it distinguishable, "because the statute now under review" (9 G. 4. c. 14.) "prevents all the mischief which the Judges in the case in *Jones* contemplated, by giving due notice that this law should have no operation till the 1st of January, nearly eight months after its enactment." Lord *Campbell* C. J. Stat. 11 & 12 Vict. c. 43. gave more than six weeks; for it passed on 14th August 1848, and, by sect. 38, was to "commence and take effect from" 2d October in that year.] In *Towler v. Chatterton* (a) the words of the Act were perhaps thought too strong to allow any latitude of interpretation; and some doubt is thrown upon the authority of the case by the judgment of Rolfe B. in *Moon v. Durden* (c).

Queen's Bench.
1852.

The QUEEN
v.
LEEDS AND
BRADFORD
RAILWAY
COMPANY.

R. Hall, contrà. It is not probable that the Legislature meant the limitation to be inoperative in every case of complaint originating before the statute: but the argument on the other side would render it so. By sect. 38, ample time was given for making good any complaint prior to the passing of the Act: and the intention was that, after 2d October 1848, the whole Act should apply to all cases. The first provision of sect. 1 applies in terms to "all cases where an information shall be laid" &c.; and the language of the Act is equally general down to sect. 11. *Moon v. Durden* (c) was a

(a) 6 Bing. 258.
(c) 2 Exch. 22.

(b) 2 Mod. 310. S. C., 2 (T.) Jones, 108.

Volume XVIII. very different case from this; the attempt there, und
1852. stat. 8 & 9 Vict. c. 109. s. 18., was to invalidate contrac
The Queen which were complete, and valid in law, when the A
v.
LEEDS and passed. (He was then stopped by the Court.)
BRADFORD Railway Company.

Lord CAMPBELL C. J. I am sorry that the objectio
founded on stat. 11 & 12 Vict. c. 43. s. 11. must prevai
probably the others might have been answered; but it
impossible to get over this. Sect. 1 lays down rules f
“all cases where a complaint shall be made,” upon whi
justices “have or shall have authority” to make a
order. The sections which follow, regulating the pr
tice, down to sect. 10, are in continuation of sect. 1, a
equally general: then sect. 11 limits the time with
which, in all cases (not otherwise expressly provi
for), such complaint shall be made. If the matter
complaint here had arisen after the passing of the Ac
there could be no doubt: then, the matter having arise
before, is the limitation clause retrospective? If it ha
been enacted that the provisions of the statute should
come into operation immediately, I should have said
that there was a hardship in their being construed retro
spectively, and I should not have been willing so to
construe them. But, here, the Act receiving the Royal
Assent on 14th *August*, sect. 38 directs that it “shall
commence and take effect from the 2d day of *October*
in the year of our Lord 1848.” That seems to be an
intimation by the Legislature that they mean to give
a time, whether long or short, within which bygone
matters of complaint may be brought before justices,
and the limitation avoided. Six or seven weeks are
given: if the interval had been as many months, the
case would be the same. We cannot apply any measure

which would enable us to say whether six months or six weeks would be the proper time. A time is given.

Towler v. Chatterton (a) is strongly in point: but, even without such an authority, we must give effect to the intention of the Legislature as shewn by these clauses.

Queen's Bench.
1852.

The QUEEN
v.
LEEDS AND
BRADFORD
Railway
Company.

WIGHTMAN J. If sect. 11 had stood alone, there would have been great room for contending, on the ground of hardship, that the limitation clause could not apply to this case, where the six months had already elapsed when the statute passed. But that reasoning fails when it is seen that the Legislature has expressly provided a reasonable time for proceeding upon any existing matter of complaint before the limiting clause can take effect. The case, therefore, falls within the reasoning of the Court of Common Pleas in *Towler v. Chatterton* (a) upon stat. 9 G. 4. c. 14.; and the proceeding is barred.

ERLE J. concurred.

CROMPTON J. I am of the same opinion. Sect. 11 enacts that all complaints there mentioned shall be made within six calendar months from the time when the matter of complaint arose. If that could not have been done in the particular case, I should have thought that the section could not apply. But, here, all the words of enactment on the subject might be carried out without unjustly excluding any remedy for existing complaints. The enactments of sect. 1 are worded generally, so as to

Volume XVIII. operate retrospectively as well as prospectively; and all
1852. the following sections (except sect. 5 which seems limited
 to future subjects of complaint) are equally general. The
 rule must therefore be absolute.

The QUEEN
 v.
 LEEDS and
 BRADFORD
 Railway
 Company.

Rule absolute.

Wednesday,
April 21st.

The QUEEN against Sir THOMAS MARYON WILSON,
 Baronet, and JOHN SUTTON, Esquire, two of
 the Justices of KENT.

When a road has been dedicated to the public by a landowner, but the conditions have not yet been fulfilled which make it repairable by the parish under stat. 5 & 6 W. 4. c. 50. s. 23., the landowner is not liable to repair it: and, consequently, he is not the "person having the management" of such road within the Railways

Clauses Consolidation Act, 1845 (9 & 10 Vict. c. 20.) s. 57.: although, since the dedication, he has voluntarily done some repairs, made a sewer and drains, and granted permission to persons desiring to open communications with the sewers, or interfere with the road; and no one else has, in these respects or any other, managed or exercised controul over the road or sewers.

Such dedicator cannot, therefore, recover penalties, under sect. 57 of the Railways Clauses Act, against a Railway Company who have made a cut across such road, rendering it impassable, and have not in due time restored the communication.

Quare whether the Company could be indicted for the obstruction of such a way by severing and not restoring it.

Queen's Bench.
1852.

The QUEEN
v.
WILSON.

carriage road, situate and being in the parish of *Plumstead* in the said county of *Kent*, that is to say a certain public carriage road called and known as "*The Plumstead Villas Road*," the whole of which road was and is situated within the said parish of *Plumstead* and county of *Kent*, so as to render the said road impassable for passengers and carriages, and that accordingly the said Company, in the exercise of the said powers, did, on 23d *December* 1848, cross and cut through the said road so as to render it impassable for passengers and carriages, by means of a certain trench or cutting of 20 feet deep and 65 feet wide, made by the said Company; and also that the first operation on the said road, whereby the same was crossed and cut through as aforesaid, was commenced between the 1st *September* 1848 and 31st *December* in the same year, to wit on the 11th *September* in the last mentioned year: and also that the said road, so crossed, cut through and interfered with as aforesaid, could and might have been, and then could and might be, restored compatibly with the formation and use of the said railway; and that more than twelve calendar months had then elapsed since the first operation on the said road so commenced as aforesaid: and also that *Lewis Davis*, of &c., surveyor and land agent, alone, from the first formation of the said road to the time of the laying of the said information and complaint, had always had, and then had, the management thereof; and that he had not by writing under his hand consented to an extension of the period allowed by law to the said Company for restoring the said road; and also that the said road was not restored by the said Company or any other persons or person on or during the 26th day of *October* 1850; which last mentioned day

Q. B. EASTER TERM.

1. elapsed after the expiration of the said period of twelve calendar months since the said first operation on the said road as aforesaid: but the said road then during the said last mentioned day remained and was wholly unrestored in any manner whatsoever, contrary to the form of the said statute in such case made and provided: Whereby, and by force of such last mentioned statute, the said South Eastern Railway Company had forfeited to the said Lewis Davis the sum of 5l. for the said last mentioned day during which the said road was not restored as aforesaid. And thereupon the said L. D. prayed that the said Company might be summoned to answer the premises. The writ then recited that the justices accordingly issued their summons to the Company to appear, on &c., at the public rooms &c., before such justices for the said county as might then be there, to answer &c.: and that the Company and Davis accordingly, appeared before the justices to whom the mandamus was addressed, on the day and at the place named.

The writ went on to state that it was proved before the last mentioned justices that the said Lewis Davis, before and in the month of August 1846, was, and then continued, seized in his demesne as of fee of and in the said piece of land over which the said road was made and that the said L. D. made and constructed the said road and dedicated the same to the public before or in the said month of August 1846: and that the said L. D. from the time of his so making and constructing the said road had, up to the time of the laying the same thereof, alone, at his own expense, repaired the said road, and that the said L. D. had made and built at

*Queen's Bench.
1852.*

The QUEEN
v.
WILSON.

own expense a sewer under the said road, and brick drains communicating therewith, and man-holes and frames for the gratings in the said road; and that, whenever any person had required to make any communication with the said sewer or to interfere with the said road, such person had first applied for and obtained the leave of the said *L. D.*; and that no person had ever interfered with the said road or the management thereof, or made any communication with the said sewer, without first applying for and obtaining the leave of the said *L. D.*; and that no person had at any time the management of the said road except the said *L. D.*, if the said facts so proved constituted him the said *L. D.* the person having the management of the said road within the meaning of the said last mentioned Act of parliament: And that the said road was, during all the time aforesaid, a public highway; and that the said parish of *Plumstead*, in which the said road was and is situate, had never adopted the said road and had never become liable to keep the said road in repair. The writ then alleged: That you the said justices, notwithstanding the premises, and that the same were then and there fully proved before you, then and there refused to determine that the said *L. D.* was, at the time of the said offence or of the laying or hearing of the said information, the person having the management of the said road within the meaning of the Railways Clauses Consolidation Act, 1845. Whereupon &c. The writ then commanded that the justices should "forthwith proceed to determine that the said *L. D.* was, at the several times" &c., "the person having the management of the said road within the meaning of the said last mentioned Act," or that they should shew cause &c.

Volume XVIII.
1852.

The QUEEN
v.
WILSON.

Return. That, at the time and place in the writ mentioned, it was also proved before us the said justices that the said *Lewis Davis* did not, at the time of the laying or hearing of the said information or at the time of the said supposed offence in the said information mentioned, hold the office of surveyor of highways of the said parish: Wherefore we the said justices deemed it to be, and then and there thought it was, doubtful, under all the circumstances aforesaid, and upon the facts proved before us, and which are stated in the said writ, whether the said *L. D.* was, in point of law, the person having the management of the said road within the meaning of the 57th section of the Railways Clauses Consolidation Act, 1845 (a): and for this reason we the

(a) Stat. 8 & 9 Vict. c. 20. s. 53. enacts that if, in the exercise of powers granted by this or any "special Act," it be found necessary to cross, cut through, &c., any part of any road, either public or private, so as to render it impassable to passengers or carriages, or to the persons entitled to the use thereof, the Company shall, before commencing operations, make a sufficient road instead of the road to be interfered with, and shall maintain the same &c.; and sect. 54 imposes penalties for omission. Sect. 56 enacts that the road interfered with shall be restored, if it can be compatibly with the formation and use of the railway, and, if not, a new one made, or a sufficient one substituted, by the Company, within six months if the road be turnpike, or within twelve if it be not, from the commencement of the first operation on the former road; unless an extension of time be consented to by the trustees or parties having the management of the road to be restored; and, if so, then within the extended period.

Sect. 57. "If any such road be not so restored, or the substituted road completed as aforesaid, within the periods herein or in the special Act fixed for that purpose, the Company shall forfeit to the trustees, commissioners, surveyor, or other person having the management of the road interfered with by the Company, if a public road, or if a private road to the owner thereof, 5l. for every day after the expiration of such period respectively during which such road shall not be so restored or the substituted road completed; and it shall be lawful for the justices by whom any such penalty is imposed to order the whole or any part thereof to be laid out in executing the work in respect whereof such penalty was incurred."

said justices refused to determine that the said *Lewis Davis* was, at the several times last aforesaid or any of them, the person having the management of the said road, within the meaning &c.

Queen's Bench.
1852.

The QUEEN
v.
WILSON.

Demurrer: and joinder.

Needham, for the Crown. The facts on the record shew that *Davis* was the "person having the management of the road" within sect. 57. Every person who dedicates a road to the public, and de facto or de jure manages it, is the manager contemplated by the Act. [Lord Campbell C. J. If he has dedicated the road, how does he differ from the rest of the public?] By doing the acts stated in the mandamus; repairing, training, and exercising an exclusive controul over the road. [Erle J. Is no one else a manager, under the circumstances of this case?] The parish surveyor does not manage, the way not having been adopted by the parish. Unless *Davis* has the management, no one has. According to the writ, he does everything which trustees of a road could do. [Lord Campbell C. J. Was he bound to repair?] He was, up to a certain time, by stat. 5 & 6 W. 4. c. 50. s. 23. (which lays down the rules for dedication of highways), in order that the parish might become liable afterwards. And it cannot yet be shewn that any other person is liable, the parish not having adopted the road. [Lord Campbell C. J. How long does the obligation to repair lie upon the dedicato] Suppose he sells the land. *Wightman* J. How would you indict him for the non-repair? Lord Campbell C. J. The indictment, if preferred, must be *ratione tenuræ*; and what is the tenure that makes him liable?] His tenure of the soil of the road itself under such circumstances. [*Wightman* J. Is there any instance

Volume XVIII.
1852.

The QUEEN
v.
WILSON.

of such an indictment? Lord *Campbell* C. J. [Does any enactment throw the burden of obligation to repair upon a dedicato? The dedication is not for his own benefit.] He must take the consequences of his act. In *Roberts v. Hunt* (a) Lord *Campbell* C. J. said: "We are clear that sect. 23 does not touch the question of the road being a highway, but only exempts the parish from repairing it." It was observed in answer: "Then it becomes a highway to the inconvenience of the party dedicating, though not for his benefit." But Lord *Campbell* C. J. answered: "He must calculate the consequences before he dedicates." [Lord *Campbell* C. J. The inconvenience to the dedicato, there referred to, is the road being out of repair; not his having to repair it.] Till the conditions of sect. 23 are fulfilled, he cannot throw the burden of repair on the parish. [Lord *Campbell* C. J. Here it never was on him.] His soil becomes a highway by his act; and he must keep it from being a nuisance. [*Wightman* J. How would you charge him in an indictment for nuisance?] The way would be a nuisance, by his act, if it were foundeuous and dangerous. [*Wightman* J. That would be a simple case of non-repair. Lord *Campbell* C. J. You have to shew how the obligation arises. Liability by reason of dedication to the public is quite new.] An analogous case is put in 4 *Bac. Abr.* 225 (7th ed.), tit. *Highways* (E). "Where a new road has been made on a writ of ad quod damnum, in the same parish with the old road, the parishioners ought to keep it in repair; because being discharged from the repair of the old road, no new burthen is laid upon them; their labour is only transferred from one place to another. But, if the new road lies in another parish, the person who sued

(a) 15 Q. B. 17. See *Fawcett v. York & North Midland Railway Company*, 16 Q. B. 610. 614, note (a).

Queen's Bench.
1852.

The QUEEN
v.
WILSON.

out the writ, and his heirs, ought to keep it in repair; because the inhabitants of the other part gaining no benefit from the other road being taken away, it would be imposing a new charge upon them, for which they receive no compensation." Some one must be liable to repair: and the party who created the road is, if the parish be not. So a person inclosing open lands on each side of a highway is bound to repair the highway.

[*Lord Campbell* C. J. Liability ratione clausuræ is well known.] In *Rex v. Kerrison* (*a*) proprietors of a navigation were authorized by statute to cut a channel through the public highway for the purposes of their navigation: they did so, and built a bridge to carry the highway across, which bridge they afterwards repaired: and it was held that they were indictable if they suffered it to be out of repair. In *The Grand Surrey Canal Company v. Hall* (*b*), where the proprietors of a canal navigation were liable, under their navigation Act, to maintain bridges, *Tindal* C. J. said: "If they build a bridge and allow persons to use it, why should not the usual consequences follow?" "There is here a statutory contract, by which the Company are bound to repair his bridge:" and the Reporters add, in a note: "Independently of the express provisions of the Act, throwing the repair of the whole of the bridges over the canal upon the Company, they would have been bound to maintain all bridges built across highways, the canal being made for private purposes, and not for the public benefit. See *Rex v. Inhabitants of Kent* (*c*), *Rex v. Inhabitants of Lindsey* (*d*), *Rex v. Kerrison* (*e*). As the

(*a*) 3 M. & S. 526.

(*b*) 1 Man. & G. 392. 401.

(*c*) 13 East, 220.

(*d*) 14 East, 317.

(*e*) 3 M. & S. 526. See the principle of these cases explained by *Patteson* J., delivering the judgment of the Court in *Regina v. The Inhabitants of the Isle of Ely*, 15 Q. B. 827. 843, 4.

Volume XVIII. bridge was not originally a public carriage way, and as it could not, for the reason already stated, become a county bridge, the dedication of it to the public seems to have thrown on the Company the liability to repair it for the public *as a carriage way*, in addition to the statutory liability imposed upon them by the Act. By such dedication the Company appear to have brought themselves within the principle of *Rex v. Kerrison* (*a*) and the other cases cited above." [Lord Campbell C. J. No doubt that is the law. And it may be reasonable that, if a party for his own benefit creates a nuisance in the public way, he shall be liable to repair the place. But that does not apply to the dedication of a highway.]

The dedicator of a highway, since stat. 5 & 6 W. 4. c. 50., knows that the parish is not liable until the acts are done which amount to an adoption; and with that knowledge he dedicates. He creates the thing to be repaired, and the liability. [Lord Campbell C. J. Then all the landlords may continue liable in *sæcula sæculorum*.] The liability would go with the land. The road is, to certain intents, a highway, and must be so kept as not to become a nuisance, with reference to what it is. *Davis*, in this case, has maintained sewers and man-holes on the line of highway; without his care they may become a nuisance and an obstruction; and he would be answerable for this, according to *Roberts v. Hunt* (*b*). That he ~~has~~ in fact done acts of repair, is not denied. [Lord Campbell C. J. If he has done them voluntarily, it is nothing. If he had been compelled, you might perhaps have been entitled to judgment by reason of his being the manager.] He has done it under a legal liability, to obtain the benefit of stat. 5 & 6 W. 4. c. 50. s. 23. [Lord Campbell

(a) 3 M. & S. 526.

(b) 15 Q. B. 17.

C. J. Has he done it ~~eo intuitu?~~] The Court will ^{Queen's Bench.} intend so. The language of stat. 8 & 9 Vict. c. 20., ^{1852.} sects. 53 to 57, is very general, and expressly includes both public and private roads. It is clearly intended that, in every case where a highway is severed and not restored, a forfeiture should be given to some one; but the remedy must be lost in a multitude of cases, if this writ be not maintainable. [Wightman J. To whose use would the forfeiture be in this case? If the prosecutor succeeded, it seems he might put it into his own pocket. Lord Campbell C. J. A surveyor, if he recovered it, could not appropriate it otherwise than to the repair of the particular road.] The forfeiture is expressly given to the trustees, commissioners, surveyor, or other person having the management."

The QUEEN
v.
WILSON.

Watson, contrà, was stopped by the Court.

Lord CAMPBELL C. J. The whole question is whether the prosecutor *Davis* is a person having the management of this highway, within stat. 8 & 9 Vict. c. 20. s. 57. If he be, he is entitled to this remedy; otherwise not. I think that a person "having the management," within this clause, must bear a character corresponding to those mentioned before, of trustee, commissioner or surveyor. How is *Davis* invested with such a character? Only, as is alleged, because the soil of the road was his and he dedicated it to the public: no act of adoption has been done by the parish; but he has performed repairs since the dedication. If Mr. *Needham* could have shewn that the dedicator of a road, under such circumstances, is bound to keep it in repair,

Volume XVIII. it would be true that he has the management within
1852. sect. 57. So, a person bound to repair ratione tenure

The QUEEN

v.

WILSON.

might very reasonably be considered the manager within this clause. But how is the dedicator of a road bound by law to repair it? It is clear that he was not so before stat. 5 & 6 W. 4. c. 50. Then does that Act, exempting the parish from repair till certain conditions are fulfilled, throw the burden on the dedicator? Clearly it has no such effect. According to *Roberts v. Hunt* (a), the road, under the present state of things, is so far a public highway that the Company may be liable to indictment if they create obstructions in it and do not remove them: but they are not liable to this penalty. The dedicator is not a person whom the Legislature intended to burden with repair. The road, upon dedication, is a highway, to be used by the public when fit for use. If a positive obstruction be created in it, the party causing such obstruction is liable for so doing: but, if the road be simply unfit for use, from the state of the weather, or from mere want of repair, the public lose the use of it, but no person can be burdened with the repair. *Rex v. Kerrison* (b) is a very different case: there the parties held liable had cut through the road for their own peculiar benefit, and were therefore obliged to repair the bridge which they had laid to carry the road over the divided part. So, by the law of *England*, if a highway runs through open ground, and a neighbour, for his own benefit, incloses the way on each side, he is bound to repair it. But there is no authority for such an obligation upon persons dedicating a road as in the

present case. It does not appear to have been done for the party's own benefit. It may have been so; but we may easily conceive that it was not. He has done some repairs; but it is not shewn that he was bound to do them. I think that, after dedication, he was, in this respect, situated as a mere stranger; and therefore that the mandatory part of this writ cannot be enforced.

*Queen's Bench.
1852.*

The QUEEN
v.
WILSON.

WIGHTMAN J. The question is, not whether the Company might have been indicted for obstructing what we might admit to be, for that purpose, a highway, but whether *Davis* is entitled to have the statutory penalty awarded to him as manager of the highway. Now the Act seems to treat the "person having the management" as one on whom a duty is cast, by joining him with trustees, commissioners and surveyors. Is there then any duty thrown upon the person dedicating a highway, under the circumstances here alleged? Before stat. 5 & 6 W. 4. c. 50., the parish was liable to repair after dedication of a road, the dedicator not. Does the statute itself, or the state of law consequent upon the statute, throw any duty upon the dedicator? He is a mere volunteer if he does any repairs: the statute lays him under no obligation to repair the road, or manage it. The prosecutor, therefore, is not entitled to this forfeiture.

ERLE J. It is unnecessary to decide whether or not an indictment would have lain against the Company for this obstruction. The penalty given by stat. 8 & 9 Vict. c. 20. s. 57. is for interfering with a public right. The prosecutor, to enforce that penalty, must come within one

Volume XVIII. of four classes; trustee, commissioner, surveyor, or other person having the management of the highway. The

1852.

The QUEEN

v.

WILSON.

Legislature has shewn its intention that he should be clothed with some duty to the public. Now, on the facts disclosed here, *Davis* appears to have acted throughout as a private land proprietor, and for private purposes, whatever may have been his motive. He does not shew himself clothed with any duty to repair, or to protect the rights of the public as passengers. And therefore he fails to bring himself within any of the classes to which the law gives a power of enforcing these forfeitures.

CROMPTON J. There might be some difficulty in saying whether or not, in a case like this, the Company might be indicted: but I think that *Davis* was not a manager of this highway within the meaning of the statute. He would not be indictable for the non-repair of it, more than the grantor of a private road. There is no mode in which an indictment could be framed against him. The only doubt I had was, whether he might not be deemed a manager in a larger sense than a mere surveyor is so. But I think he is not in any view a manager: no public duty is cast upon him: he spends his own money for his own purposes, and is a mere volunteer.

Judgment for defendant

Queen's Bench.
1852.

The Queen against The Justices of LANCASHIRE. *Wednesday,
April 21st (a).*

~~A~~ RCHBOLD, in last Hilary term, obtained a rule nisi for a mandamus to the justices of the county of Lancaster, commanding them to enter continuances and hear an appeal of the guardians of the poor of the Conway Union and the overseers of the parish of Llandudno in the county of Carnarvon, against an order of two justices of the county of Lancaster, adjudicating the settlement of J. P., a lunatic pauper, confined in the county asylum of the said county, to be in Llandudno, and ordering the costs of his maintenance to be paid by the Conway Union.

Where an order is made by two county justices, under stat. 8 & 9 Vict. c. 126. s. 62., for the maintenance of a lunatic pauper removed to the county asylum from a borough within the county, having a separate court of Quarter Sessions, the appeal against such order lies exclusively to the borough Quarter Sessions.

It appeared from the affidavits that, in March 1851, two justices, in the commission both for the borough of Liverpool and for the county, made, at Liverpool, an order upon the parish of Liverpool, to which the pauper was then chargeable, and which is wholly within the said borough, for the removal of the pauper to the county Lunatic Asylum, which is also the public Lunatic Asylum for the borough. In August, 1851, two other justices, also in the commission both for the borough and the county, made an order at Liverpool, adjudicating the settlement of the pauper to be in Llandudno, and ordering the costs of his removal to the asylum, and of his

(a) And Thursday, April 22d. The same Judges were present on both days.

Volume XVIII.
1852.

The QUEEN
v.
Justices of
LANCASHIRE.

future maintenance, to be paid by the *Conwy* Union, in which *Llandudno* is comprised. The *Conwy* Union appealed against this order. The borough of *Liverpool* is a borough within the Municipal Corporation Act, with a special commission and a separate court of quarter sessions, and was, before that Act, by charter, a borough, with a recorder and a court of quarter sessions; and there is no non-intromittant clause in either the charter or the commission of the peace. The justices for the county have concurrent jurisdiction within the borough with the justices for the borough. On the appeal coming on for hearing at the Quarter Sessions for the county, it was objected, for the respondents, that the county Sessions had no jurisdiction, and that the appeal should have been to the Court of Quarter Sessions for the borough; and the county Sessions refused to hear the appeal.

Pashley now shewed cause. The appeal against this order of maintenance can lie only to the borough Quarter Sessions. The order is made under the provisions of stat. 8 & 9 Vict. c. 126. s. 62.; and that section provides that "the guardians of any union or parish, or the overseers of any parish, township, or place, affected by" any "such order, may appeal against the same in like manner as if the same were a warrant of removal" (a). And in *Regina v. Justices of Glamorganshire* (b) and *Regina v. Inhabitants of St. Peter, Barton on Humber* (c), it was held that orders for the maintenance of pauper lunatics, and thus, indirectly, orders for the removal, were within the provisions of that section. No

(a) See stat. 16 & 17 Vict. c. 97. ss. 1., 108.

(b) 13 Q. B. 561.

(c) 17 Q. B. 630.

in *Regina v. The Justices of Suffolk* (a) it was held that stat. 5 & 6 W. 4. c. 76. s. 105. transferred to the Quarter Sessions held for boroughs under that Act the jurisdiction to hear appeals against warrants of removal made by justices for the borough, which, by stat. 8 & 9 W. 3. c. 30. s. 6., had been given to county Quarter Sessions; and therefore that, where the removal is from the borough, the appeal against the order lies to the borough Quarter Sessions. And, in *Regina v. Recorder of Liverpool* (b), it was decided that this jurisdiction of the Borough Quarter Sessions was not affected, where such warrant of removal issued in the borough, by the fact of its having been issued by justices for the county, having concurrent jurisdiction with justices for the borough. The appeal against the order of maintenance in the present case, therefore, inasmuch as, by stat. 8 & 9 Vict. c. 126. s. 62., it is to follow the same rule as an appeal against an ordinary warrant of removal, lies to the Quarter Sessions of the borough, the removal having been from the borough.

The QUEEN
v.
Justices of
Lancashire.

Archbold and *Welsby*, contra. The appeal lies to the county Quarter Sessions. The justices for the borough may make an order of removal, but not an order of maintenance. [Lord Campbell C. J. They cannot make an order of maintenance as justices for the borough; but justices in the commission both for the county and for the borough may make an order of maintenance, in respect of a removal from the borough, in the first of their two capacities.] If, as justices for the borough, they have no power to make an order of

Volume XVIII. maintenance, it seems absurd to contend that, as such,
 1852. they have appellate jurisdiction with respect to such orders.

The QUEEN

v.

Justices of
LANCASHIRE.

[*Lord Campbell* C. J. There is no absurdity; the only question is, whether the Legislature intends to give them such jurisdiction.] There is no instance, except under stat. 8 & 9 *W. 3. c. 30. s. 6.*, of an appellate jurisdiction being given in cases where there is no original jurisdiction. In *Regina v. Recorder of Liverpool* (*a*) the order appealed against was an order of removal which the justices for the borough, as such, had a right to make. [*Lord Campbell* C. J. But it was made by justices for the county.] *Regina v. Justices of Glamorganshire* (*b*) decides only that the form of proceedings, after the bearing of the appeal has commenced, is to be the same as in the case of an appeal against a warrant of removal. The words "in like manner," in sect. 62, refer only to the formal proceedings connected with the appeal, not to the tribunal before which they are to be carried on. Sect. 62 goes on to provide that the clerk of the peace for the county may defend the appeal in certain cases. It cannot have been intended that he should defend it at the borough Quarter Sessions. [*Lord Campbell* C. J. He is to defend where the pauper is chargeable to the county. *Coleridge* J. Why should he not defend an appeal to the borough Quarter Sessions? He supports the interests of the county which is chargeable.] *Regina v. Justices of Lancashire* (*c*) is directly in point for the appellants.

Lord CAMPBELL C. J. This case turns entirely on the construction of stat. 8 & 9 *Vict. c. 126. s. 62.*; and

(*a*) 15 Q. B. 1070.

(*b*) 13 Q. B. 561.

(*c*) 12 Q. B. 305.

we have merely to see what the Legislature has there enacted. No doubt it had the power to give an appeal to the borough Quarter Sessions against an order made by two justices for the county; and, as there is no appeal unless given by the Legislature, we must look at the Act to ascertain whether such an appeal is given. Now sect. 62 enacts that there may be an appeal against an order for the maintenance of a pauper lunatic "in like manner as if the same were a warrant of removal." Then, what is the appeal given against an order of removal? It lies to the Quarter Sessions of the place from which the removal is made. The appeal, therefore, against the order of maintenance in the present case, though the order was made by justices for the county, lies to the Quarter Sessions for the borough of Liverpool, the removal having been from a parish within that borough. This follows necessarily from our decision in *Regina v. Recorder of Liverpool* (a), in which *Regina v. Justices of Lancashire* (b) was brought under our consideration, and where we held that an appeal against an order of removal from a borough, although made by justices for the county, lies to the Quarter Sessions for the borough, and not to the Quarter Sessions for the county.

Queen's Bench.
1852.

The QUEEN
v.
Justices of
Lancashire.

COLE RIDGE J. I am of the same opinion. It must be conceded that an appeal of this kind can exist only by a positive statutory enactment. To give effect to stat. 8 & 9 Vict. c. 126. s. 62., we must construe the words "in like manner as if the same were a warrant of removal" as including the whole subject matter of the

Queen's Bench.
1852.

STAPLETON *against* CROFTS.

Friday,
April 23d.

ASSUMPSIT for goods sold and delivered. Plea, Stat. 14 & 15 Vict. c. 99. does not remove the objection to admitting as a witness the wife of a party to the record. Held by Lord Campbell C. J., Wightman and Crompton Js.; Erle J. dissentiente.

Non assumpsit. Issue thereon.

On the trial, before *Erle J.*, at the sittings at *Westminster* in last term, the defendant's wife was called as a witness for the defendant. The evidence was objected to; but the learned Judge admitted it. Verdict for the defendant.

In the ensuing term *Huddleston* obtained a rule nisi for a new trial, on the ground of the improper reception of evidence.

Montague Chambers and *Welsby* now shewed cause. Stat. 14 & 15 Vict. c. 99. takes away the objection to the admissibility of a person named on the record, or interested in the suit. The defendant himself may therefore be called. The ground of the objection to the wife as stated in *Co. Litt.* 6. b. is twofold. First, "quia sunt duæ animæ in carne unâ;" an objection which is at once removed by the statute taking away the objection to one half of the united person. The other objection is of general policy; because "it might be a cause of implacable discord and dissension between the husband and wife, and a means of great inconvenience:" but that reason has not been acted on; as in *Annesley v. Earl of Anglesey* (a) a wife was admitted to give evidence that her

Volume XVIII. husband was not to be believed upon his oath. It
 1852. must be admitted that there is a recent decision of the
 STAPLETON Exchequer, in *Barbat v. Allen* (*a*), against the admissi-
 v. bility of the wife.
 CROFTS.

Huddleston and *Holl*, contrà. The reasons given in
Barbat v. Allen (*a*) are strong; and the decision is
 expressly in point.

Lord CAMPBELL C. J. I regret to be obliged to say that, in my judgment, the rule must be absolute; for my private opinion is that it would be an improvement on the law to admit the testimony of married persons, for or against each other, subject to some restrictions. I think they ought not to be permitted to disclose confidential communications, or to criminate each other: but, subject to limitations, I think that the admission of their testimony would forward the ends of justice. However, I am now to declare what the law is; and for that purpose I must look to the statute as it has received the Royal assent. I cannot take into consideration the history of the bill, or speculate on the intentions of those who promoted or altered it, but must look to the Act as it is. Now it is quite clear that before Lord Denman's Act (6 & 7 Vict. c. 85.) the wife could not be called for or against her husband. When the issue was between strangers, the husband and wife might be called, though they contradicted each other, even to the extent to which it was carried in *Annesley v. Earl of Anglesey* (*b*); but where the husband himself was the party the wife could not be called for or against him. One

(*a*) 7 *Exch.* 609.

(*b*) 17 *How. St. Tr.* 1276.

reason given by Lord *Coke* in *Co. Litt.* 6. b., and adopted by Lord *Hardwicke* (*a*), is the preservation of the peace of families. Such being the law, and one of the reasons for it, Lord *Denman's* Act contained an express provision that that Act should not render admissible parties to the record, or their husbands or wives. Stat. 14 & 15 Vict. c. 99. does not, as I think, either expressly or impliedly admit the testimony of the wife which was before inadmissible. Sect. 1 repeals a part only of the proviso in Lord *Denman's* Act: but, had it repealed the whole of that proviso, the case of the wife would not be within the purview of the Act, which was pointed only at objections on the ground of interest. The enabling clause of stat. 14 & 15 Vict. c. 99. is sect. 2, which certainly does not expressly admit the wife of the party; but it is urged that it does so impliedly, inasmuch as the wife and husband are one person. But the maxim cannot be understood in this sense. It might as well be said that under a ca. sa. directed against the husband the wife might be taken in execution because she and the husband were one.

Stress is laid on sect. 3, where it is enacted that the husband and wife shall not be competent or compellable to give evidence against each other in any criminal proceeding. If there were such language as left it doubtful whether the construction of the Act was such as to admit the evidence of the wife, this would afford an argument in favour of that construction; but I cannot think it is sufficient by implication to make them admissible in other than criminal proceedings. Such has been the opinion of Lord *Truro* (*b*), and of the Court

Queen's Bench.
1852.

STAPLETON
v.
CROFTS.

(a) *Barber v. Dixie*, Ca. K. B. Temp. *Hardwicke*, 264.

(b) *Percival v. Caney*, Chanc. 26th January, 1852.

~~June XVIII.~~ of Exchequer (*a*). If I entertained a different opinion
1852. it would be my duty to express it, until the decision
STAPLETON of a higher Court set me right; but I agree with
v. CROFTS. them.

WIGHTMAN J. It is contended that the objection to the admissibility of the wife is removed by stat. 14 & 15 Vict. c. 99. That Act however in its terms applies only to "the parties" to any suit. Now the wife of a party is not herself a party to the suit; and the terms of the Act do not embrace this case. But, independently of the terms of the Act, I think that the object appears to have been to complete the removal of objections on the ground of interest: and the objection to admitting the wife of a party is not merely on the ground of her identity in interest with her husband, but depends upon a broader view of the relation of husband and wife, and on the interest which the public have in the preservation of domestic peace and confidence between married persons.

CROMPTON J. I am of the same opinion, and should not have considered the question doubtful, were it not for the opinion which I know my brother *Erle* is about to deliver on the opposite side.

It seems to me entirely a question on the construction of this Act. I disclaim as grounds for my opinion any reference to policy, or what I think ought to have been enacted, or even what I may believe those who passed the Act might have wished to express in it. I construe the Act as it is.

(a) *Barbat v. Allen*, 7 Exch. 609.

Queen's Bench.
1852.

STAPLETON
v.
CROFTS.

Before that Act the wife, for whatever reason, clearly was inadmissible. Now, if we look at sect. 1, which repeals a portion of Lord Denman's Act, it is a strong observation that the repealing provision stops where it does. It repeals part of the original enactment which affected that which was the subject of legislation, so as to clear the ground for the enactments to come; and in doing so it stops short of the incompetency of the wife, which, it is contended, was part of what was to be removed. But the enabling and enacting clause is sect. 2. That section contains no words that can embrace the case of a wife not a party to the record. Perhaps when the husband and wife are joined on the record the word "party" may be wide enough to include both; but that is not the case here. Then follows sect. 3, the language of which, when I first read it, made me, and I dare say made every one else, doubt and look back to see whether the wife was not made a competent witness. It is difficult, looking merely at the Act, to see an object for this section; it may have been introduced *pro maiore cautelâ*: but, whether that be the object or not, there is not enough in it to shew that the Legislature meant to include the wife in the enabling clause. I think that, taking the whole statute together, the intention appears to have been to exclude her from the enactment: and for this I rely mainly on the language in sect. 2.

It is said that the ground on which the wife is rejected is the identity in interest between her and her husband, the party to the record. If that were so, it would not follow that because the one was enabled to be a witness the other was. The ground of objection, the interest, remains; but the Legislature has by express enactment

Volume XVIII. said that it shall no longer be an objection to the admissibility of the party: the objection to the admissibility of the wife is left untouched. The Legislature might have taken away the objection to both; but they have not chosen to do so: and, there being no words enacting that the wife shall be admissible, I think she continues inadmissible.

ERLE J. I am of opinion that stat. 13 & 14 Vict. c. 99. s. 2., rendering parties to a suit competent witnesses, has rendered the wives of parties also competent.

The law relating to exclusion of evidence on account of interest gave effect to the principle of uniting the interest of husband and wife. If the husband was excluded on account of interest, so was also the wife on account of her united interest; and, if the capacity of the husband was restored, the wife became thereby also capable. Although the wife had no direct interest during coverture in personal property, she was taken to have an indirect interest derivative from that of her husband.

The party to a suit was both excluded and exempted on account of his interest. For the same reason and from the same union of interest the wife of a party was also exempted and excluded. If capacity was restored to the parties by judgment by default, by nolle prosequi or otherwise, the capacity of the wife was also restored thereby. It seems to me to follow that, when the incapacity of parties is taken away by statute, the incapacity of the wives of parties should also cease, and the union of capacity or incapacity be still maintained.

This brings me to the question whether there was any other principle for excluding the wife of a party besides

*Queen's Bench
1852.*

STAPLETON
v.
CROFTS.

this union of interest and privilege between husband and wife. Upon the affirmative side, authorities are cited for exclusion of the wife with a view to preserving the peace of families; they are collected in *Taylor on Evidence*, vol 2, p. 899 (*a*), where it is said the admission of such testimony would lead to dissension and unhappiness, and probably to perjury, and because the confidence subsisting between husband and wife should be ~~sacredly~~ cherished.

There is no doubt that the law most carefully protects the interests connected with marriage, and established the union of interest above mentioned for the purpose of domestic union, and excluded the testimony of the wife, where the husband was excluded, on account of this union; and the expressions above cited, if confined to the exclusion of the wife when the husband is excluded, have a definite meaning, capable of a practical application: but, if they are carried beyond this limit, and are supposed to introduce tendency to domestic discord as a ground of exclusion, they will be found to be contrary to known principles of evidence, and to be incapable of being consistently applied. For, if this ground of exclusion existed, it would apply to other witnesses, as well as to parties, their domestic peace being equally important. But it is clear with respect to witnesses, not parties, that they cannot refuse to be examined on any ground derived from marriage, and that husbands and wives may mutually contradict and discredit each other upon matters full of family dissension, as freely as if the marriage was null.

Even if it could be supposed that the law regarded only the domestic peace of parties, and protected their

(a) See 2d ed. Vol. 1. p. 729. Vol. 2. p. 1058. et seq.

Volume XVIII. confidence, still the supposed ground of exclusion is not consistently applied; for, if a husband is assaulted or

1852.

**STAPLETON
v.
CROFTS.** libelled, he may seek redress either by action or indictment. In either form he is in substance the party. If he proceeds by action, he and his wife were incompetent. If by indictment, both are admissible either to corroborate, or contradict or discredit each other. Now, if the principle of excluding the wives of parties was protection of domestic peace and confidence, the wife ought to be excluded equally in both cases: but she was excluded only in the action, where, as the husband was also incompetent, it seems better reasoning to attribute her exclusion to the uniform principle of union, than to suppose a regard for domestic peace in the civil Court, to be neglected in the criminal Court.

With respect to the protection of confidential communications between husband and wife, there seems good reason for such protection at all times: but no such principle has been brought into practice.

The decisions excluding the wives of parties have been accompanied with general declarations in favour of such protection. But, as the exclusion extended to all the testimony of the wives of parties, whether it was confidential or not, and as no protection was given to conjugal confidence in respect of the wives of witnesses, not parties, who are as much within the reason of the rule, if it existed, as the first mentioned class, I think the rule has not yet been established.

As to the authorities, most of the decisions for the exclusion of the wives of parties were given in cases when the husband was excluded, and so are consistent with the principle of union of admissibility. In *Bentley v. Cook* (a) the wife was plaintiff, and so the husband

(a) 3 Doug. 422.

~~was excluded; in *Davis v. Dinwoody* (a) the wife's trustees were plaintiffs on her behalf, and so the husband was excluded; and thus in *Hawksorth v. Showler & Boyce* (b) the wife of *Boyce* was excluded from giving evidence for *Showler*, because she was the wife of a party to the issue under trial, who was incapacitated either for or against himself, and the same incapacity extended to the wife.~~

Queen's Bench.
1852.

STAPLETON
v.
CROFTS.

~~The decisions excluding the wife where the husband was not excluded, upon some general purpose of promoting conjugal peace, appear untenable.~~

~~In *Broughton v. Harpur* (c) the question in ejectment was whether the plaintiff was son and heir of *Hannah Jaques*; and the first wife of *Jerome Jaques* was called by the defendant to prove that his supposed marriage with *Hannah* was null because she had been previously married and was still alive, and was rejected on the ground, as mentioned in the report, that she swore to her advantage to get a husband, but on the ground, as mentioned in some later cases (d), that she would criminate her husband of bigamy, and, in others (e), that she would occasion dissension with her husband. But her evidence would operate nothing in regaining her husband; nor would it criminate him more than the public offer of it: and dissension was not probable; and according to the law, as now settled, the witness would be admitted.~~

~~In *Rex v. Cliviger* (g), upon a question of the settlement of a woman as a wife, the former wife of the alleged husband was held inadmissible to prove the former~~

(a) 4 T. R. 678.

(b) 12 M. & W. 45.

(c) 2 Ld. Ray. 752.

(d) See *Rex v. All Saints, Worcester*, 6 M. & S. 194.

(e) See *Rex v. Cliviger*, 2 T. R. 267.

(g) 2 T. R. 263.

Volume XVIII. marriage, and contradict the husband, because it might
 1852. tend to criminate him of bigamy and perjury. Here also
 STAPLETON the public offer of the evidence had all the tendency
 v. CHORFS. that the evidence would have had; and here also evi-
 dence essential for ascertaining the truth was excluded
 lest a tendency should be created which already existed.
 The principle of exclusion laid down in this decision
 was received with dissent by the Court in *Rex v. All
 Saints Worcester* (*a*) and in *Rex v. Bathwick* (*b*); and in
 these cases the exclusion of the wife was said to be
 confined to cases where the husband was a party. They
 therefore in effect deny any direct ground of exclusion
 on account of domestic peace, as applicable to all wit-
 nesses. In *O'Connor v. Majoribanks* (*c*) the widow was
 held incompetent to prove the authority of her deceased
 husband to pledge some property for a loan, on the
 ground that confidential communication between hus-
 band and wife should be protected: and, although the
 communication in question was not confidential but
 intended to be divulged, the Court thought it necessary
 to exclude evidence of all communications, to secure the
 exclusion of those which were confidential. I may be
 allowed to doubt this necessity, and to inquire whether
 it is satisfactory to sacrifice the interest of truth by
 excluding essential evidence for the sake of protecting
 a confidence which never existed.

These cases lead me to the conclusion that from the
 union of interest between husband and wife there was a
 union of incapacity, and upon a restoration of capacity
 to the one the other is also rendered admissible.

The legislative authority for the admission of wives is

(*a*) 6 M. & S. 194.

(*b*) 2 B. & Ad. 639.

(*c*) 4 M. & G. 435.

strong. In the county courts they are made competent; there has been ample experience of their evidence; and no objection has been made. In bankruptcy the necessity for examining the wives of bankrupts has been long recognised; and, under the statute now to be construed, the wives, if parties to the record, are admissible for or against their husbands; and inconsistency is attributed to Parliament if it be supposed to have intended that the wives of parties generally should be excluded, but the wives of parties, having an individual as well as conjugal interest, should be admissible.

Queen's Bench.
1852.

STAPLETON
v.
CROFTS.

If the question may be considered with reference to the interest of truth, it is clear the exclusion of essential information as a means for finding truth is absurd. It is not doubted that wives often possess essential information as to matters within the usual province of a wife, and as to those conducted by her as agent for her husband, and as to those which she has happened to witness.

If essential witnesses are excluded, there is the certain evil of deciding without knowledge, and there is the probable evil of shaking confidence in the law: these evils are certain; and, if the notion of a compensating good in the promotion of domestic happiness by rendering the wife powerless as a witness be analysed, I believe it will be found illusory. The idea that husbands generally would suborn their wives to perjury, and persecute them if they spoke truth, is, to my mind, unworthy of the time; there is no reason for supposing that wives, if admitted, would be worse treated in respect of their testimony than in respect of any other part of their conduct, or be more prone to untruth than any other class of witnesses: and, if, by reason of the exclusion of the wife, the husband has to suffer an adverse judgment

Volume XVIII. contrary to truth, and the consequent loss, he would dissent with much reason from the zealous declarations that such a mean for protecting the peace of his family and the sanctity of his marriage was better than administering the law according to truth.

1852.
STAPLETON
v.
CROFTS.

These observations apply to the present case; for the husband was examined, and did not understand the matters in question, which had been managed by his wife. If she had been excluded the verdict would have been for the plaintiff, and the defendant would have been made liable to a demand contrary to the truth. As these considerations were in my mind before the judgment of the Exchequer in *Barbat v. Allen* (*a*), and as they refer entirely to the effect of the second section, which was not much discussed in that case, I trust I am not wanting in deference if I say that my opinion is not changed.

Rule absolute (*b*).

(*a*) 9 *Exch.* 609.

(*b*) Reported by C. Blackburn, Esq.

Friday,
April 23d.

BROUGHTON *against* JACKSON.

To a count in trespass for assaulting and falsely imprisoning plaintiff,

TRESPASS. The declaration stated that defendant, on &c., and on divers other days &c., with force and putting him in irons, defendant pleaded: That he was commander of one of the Queen's ships of war, at sea; that plaintiff, at the times when &c., was steward of the ship, and, as such, was servant to defendant on board the said ship, and had access to his cabin, and had the charge of his goods and chattels there; that on two occasions, just before the times when &c., moneys had been feloniously stolen from defendant's possessor out of a desk then being in his said cabin; that upon each occasion the desk had been clandestinely opened by means of a key, and the plaintiff had access to and could have obtained the key of the said desk and unlocked the same and taken away the sa moneys; and defendant then believed that no other person had or could have obtained access to the key of the said desk without plaintiff's knowledge; Wherefore defends having probable cause of suspicion, and suspecting the plaintiff for, among other things, causes aforesaid, to have been guilty of the stealing &c., did, as such commander, and as lawfully might for the cause aforesaid, gently lay hands &c., and put plaintiff in irons, as

arms, assaulted the plaintiff, and then beat, bruised and ill treated him, and then put the plaintiff in irons, and then imprisoned him, and then kept and detained him in prison, without any reasonable or probable cause whatsoever, for a long space of time, (to wit) the space of one month then next following, contrary to law and against the will of the plaintiff, whereby plaintiff was greatly hurt &c., and was prevented from attending to his lawful affairs, and injured in his credit.

Queen's Bench.
1852.

BROUGHTON
v.
JACKSON.

keep him (the same being a reasonable mode of detainer) for a reasonable time until defendant, as commander &c., could examine into the circumstances of suspicion against plaintiff according to law and for the purpose of reporting to the Lords of the Admiralty or bringing plaintiff to trial, if it appeared right to do so. Repli- cation, De Injuria.

After ver- dict for defend- ant on this plea,

Held, on motion for judgment non obstante veredicto,

That, in an action for false imprisonment on a criminal charge by a person not being a peace officer, mere belief is not a sufficient

Pleas. 1. Not Guilty. Issue thereon.
 2. As to the assaulting, beating and ill treating plaintiff, and putting him in irons, and imprisoning and keeping and detaining him, in the declaration mentioned : That, before and during all the time in the declaration mentioned, (to wit) on 18th *September*, A.D. 1851, and on the said other days therein mentioned, defendant was a Lieutenant in the Royal Navy and Commander of Her Majesty's steam vessel and ship of war "*Lucifer*," then belonging to the Royal fleet, and then lying and being on the high seas, (to wit) in *Douglas Bay*, off the *Isle of Man*. And that, before and at the said times when &c., (to wit) on 16th *September* in the year aforesaid, the plaintiff was steward of and on board the said vessel and belonging to the fleet, and, as such steward, was the servant of defendant, and had access to the cabin of defendant in the said ship, and the charge of the goods and chattels of defendant then being in such cabin: and, plaintiff so being such servant as aforesaid, divers moneys of defendant, (to wit) two

justification, but facts must be shewn on which the belief was grounded, in order that the Court may judge whether or not the defendant had probable cause for arresting. That all the facts need not be set out, but only enough to shew ground of reasonable suspicion. That the facts alleged here were sufficient, at least after verdict ; and, per Lord *Campbell* C. J., they would have been so on demurrer.

And that, if the plaintiff meant to contend that the facts did not justify putting in irons as a mode of detainer, he should have new assigned.

June XVIII. pounds and ten pounds respectively, the property of
1852. defendant, had been and were feloniously stolen, taken

BROUGHTON
v.
JACKSON. and carried away from and out of the possession of defendant, and out of a certain desk then being in the

said cabin, upon two several occasions just before the said times when &c., to wit on the day and year last aforesaid: And defendant saith that, upon each occasion on which the said sums of money were respectively stolen, the said desk had been clandestinely opened and unlocked for that purpose by means of a key; and that the plaintiff had access to and could have obtained the key of the said desk, and could have unlocked and opened the same and taken and carried away the said moneys upon the said several occasions aforesaid: And defendant saith that he then believed that no other person had or could have obtained access to the key of the said desk without the knowledge of the said plaintiff: Wherefore defendant, having good and probable cause of suspicion and vehemently suspecting the plaintiff for, among other things, the causes aforesaid, to have been guilty of or concerned in the stealing and carrying away of the said moneys of defendant, did, at the said times when &c., as such commander as aforesaid, and as he lawfully might for the cause aforesaid, gently lay hands upon the plaintiff, and did put him in irons, and so did keep and detain him (the same being a reasonable mode of detainer), as in the declaration mentioned, for a reasonable time, to wit until defendant, as commander of the said ship in which the said felony was committed, could examine into and investigate the circumstances of suspicion against the plaintiff according to law, and for the purpose of making a due report of all the said circumstances to and for the information of the Lords of

the Admiralty, or of bringing the plaintiff to trial on the said felony, if upon investigation it appeared to him the defendant right and proper so to do. And defendant avers that he did, as such commander, and within a reasonable time in that behalf, to wit on the day and year last aforesaid, examine into and investigate the said circumstances of suspicion against the plaintiff touching the said felony, and did afterwards, and within a reasonable time in that behalf, to wit on the day and year aforesaid, discharge and release the plaintiff from further custody and detainer. And defendant saith that by means of the aforesaid premises the plaintiff was assaulted and imprisoned, and kept and detained, as in the declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the cause aforesaid: which are the alleged trespasses in the introductory part of this plea mentioned, and whereof plaintiff hath above complained against defendant. Verification.

Queen's Bench.
1852.

BROUGHTON
v.
JACKSON.

Replication: De Injuriâ. Issue thereon.

On the trial, before Lord Campbell C. J., at the sittings in Middlesex after last Michaelmas term, a verdict was found for the plaintiff on the first issue and for the defendant on the second. *Prideaux*, in last Hilary term (January 15th), moved for a rule to shew cause why there should not be a new trial (*a*), or judgment for the

(*a*) The grounds were that the verdict was against the evidence, and that the Lord Chief Justice had left it to the jury to say whether or not the putting in irons was, as alleged in the plea, "a reasonable mode of detainer;" this (as *Prideaux* contended) being a point of law, which the Judge himself ought to have determined. [Lord Campbell C. J. Was not it for the jury to say whether, under the circumstances, it was reasonable to put a man in irons? *Wightman* J. If the words had been "a necessary mode of detainer," could there have been any doubt? Suppose the question to

Volume XVIII. plaintiff on the second issue, non obstante veredicto.

1852.

**BROUGHTON
v.
JACKSON.**

The Court granted a rule nisi for judgment non obstante veredicto, and ordered the case to be put into the special paper, and argued as on a concilium.

Keating now shewed cause. The question is, whether the circumstances pleaded as the cause of detention are a sufficient justification after verdict. It must be admitted that this is a matter to be decided by the Court. The authorities are in favour of the defendant. In *Mure v. Kaye* (*a*), which was cited in moving, the averments on which the justification mainly rested were that certain things were done "suspiciously;" no rational ground of suspicion being shewn upon the record. That was a much weaker case than the present; and the argument was on demurrer. Slighter grounds of charge than are shewn here were held to support the justifications in *Beckwith v. Philby* (*b*) and *Musgrove v. Newell* (*c*). In the latter case, though the plaintiff had a verdict on the first trial, *Alderson* B., on the second, "directed a nonsuit upon the ground that there was probable cause" (*d*). In *Davis v. Russell* (*e*), where the suspicion was grounded wholly upon an anonymous letter, the Judge told the jury (in substance) that the facts, if believed by them,

have been whether or not the plaintiff made so much resistance that confinement in irons became necessary: surely that was for the jury. If that was so, then the necessity was not made out by the evidence. *Wright v. Court*, 4 B. & C. 596, shews this. The Court (Lord Campbell, C. J., Patterson and Wightman Js.) refused a rule nisi for a new trial.

(*a*) 4 *Taunt.* 34.

(*b*) 6 B. & C. 635.

(*c*) 1 *M. & W.* 582. *S. C. Tyr. & G.* 957.

(*d*) *Alderson* B. so stated in *Panton v. Williams*, 2 Q. B. 169. 186.

(*e*) 5 *Bing.* 354.

were probable cause; and this was held a sufficiently good direction. [Crompton J. The case of most frequent occurrence is when facts are alleged as ground for carrying the plaintiff before a magistrate, not for the defendant's taking the law into his own hands.] The captain of a ship holds, in some sense, the situation of magistrate, while on board his ship. *West v. Baxendale* (*a*), though the decision turned on points not raised by the present case, shews that the defence is sufficient in law if facts are pleaded and proved to such an extent as justifies a suspicion. [Lord Campbell C. J. It is impossible to enunciate as a distinct proposition what is or is not probable cause; which has made me doubt, or at least regret, probable cause being matter of law.]

Queen's Bench.
1852.

BROUGHTON
v.
JACKSON.

Prideaux, contra. It may be admitted that every case of this kind must stand on its own grounds: but the defendant has to shew actual causes of suspicion which would justify arresting the plaintiff, keeping him in custody, and subjecting him to examination; and of those causes the Court will judge, as was done in *Mure v. Kaye* (*b*). Wherever the justification has been held sufficient, some facts have been shewn, tending to implicate the plaintiff, and not a mere belief, as in the present plea. Facts of this kind were set forth and proved in *West v. Baxendale* (*a*): and the distinction was there pointed out in argument (with respect to a piece of evidence rejected by the Judge), between facts which shew probable cause, and facts which only shew bona fides in the defendant. His belief may be material to the question of bona fides, but not to that of probable cause. A

(*a*) 9 *Com. B.* 141.

(*b*) 4 *Taunt.* 34.

Volume XVIII. belief is alleged in the present case, but no facts beyond 1852. it to which the Court can ascribe any weight. "The

BROUGHTON
v.
JACKSON.

"key of the said desk" is not stated to have been that with which the desk was opened. [Lord Campbell C. J. May not we intend so after verdict?] It is not alleged that in fact no person but the plaintiff had access to the key. There is no ground for saying that the captain of a ship acts, in a case like this, with the authority of a magistrate. As to putting the plaintiff in irons, "the same being a reasonable mode of detainer" is not a justification in fact, but only the expression of an opinion. [Wightman J. The jury have found that it was a reasonable mode.] The question was not raised in the form of an issue of fact. In *Wright v. Court* (a) the defendants were charged with falsely imprisoning the plaintiff and handcuffing him; and their plea was, that "they handcuffed plaintiff" "in order to prevent his escape, and took him so handcuffed before a justice, to be then and there interrogated" &c.: but the Court held this insufficient, saying: "The defendants have also justified handcuffing the plaintiff in order to prevent his escape, but they do not aver that it was necessary for that purpose, or that he had attempted to escape." There is no distinction on this point between arrests at sea and on shore. Suspicion of felony does not justify putting in irons: specific grounds of fact ought to be shewn. *Seymour v. Maddox* (b) bears an analogy to this case. There the declaration was in case for leaving an aperture in the floor of a theatre insufficiently fenced and lighted, whereby the plaintiff suffered injury: the declaration, after stating certain facts, averred "that it then became

and was the duty of the defendant" to cause the said floor to be lighted &c.: and the Court held, on motion in arrest of judgment, that the count was insufficient, for that the facts set forth did not shew any legal duty, and that the allegation of duty could not aid, for that the declaration must stand or fall by the facts stated. The question of duty, as, here, the question of belief, was not one upon which the jury had means of deciding.

Queen's Bench.
1852.

BROUGHTON
v.
JACKSON.

Keating, in reply. The substantive complaint in this case is the coercion, generally; if the plaintiff meant to contend that the coercion by putting in irons was excessive, he should have new assigned. The plea alleges it to have been a reasonable mode of detainer. In *Wright v. Court* (a) the defendants pleaded, as their justification of handcuffing plaintiff, that it was "to prevent his" escape: and the objection, on demurrer, was, that the averment made it necessary to shew that an attempt to escape was made, or might have been expected but for the handcuffing.

Lord CAMPBELL C. J. I think this plea is sufficient, and would have been so on demurrer. The defendant, in a case of this kind, must shew reasonable grounds of suspicion for the satisfaction of the Court; it is not enough to state that he himself reasonably suspected. But he is not bound to set forth all the evidence; it is enough if he shews facts which would create a reasonable suspicion in the mind of a reasonable man. Now the facts stated here are that the plaintiff was the defendant's servant, and, as such, had access to his cabin, and had the charge of his goods and chattels there; that,

Volume XVIII. on two occasions just before the times when &c., moneys
1852. had been feloniously stolen from the defendant's pos-

SESSION, out of a desk then being in his said cabin; that
BROUGHTON
v.
JACKSON. upon each occasion the desk had been clandestinely
opened by means of a key; and that the plaintiff had
access to and could have obtained the key of the said
desk and unlocked the same and taken away the said
moneys, and defendant believed that no other person
had or could have obtained access to the key of the said
desk without plaintiff's knowledge: wherefore the de-
fendant, having probable cause of suspicion, and suspect-
ing the plaintiff for, amongst other things, the causes
aforesaid, to have been guilty of the stealing, did, as he
lawfully might, &c. Was there not, under these cir-
cumstances, sufficient ground for suspecting that the
plaintiff had committed the felony? The plaintiff is
alleged to have had access to "the key" of the desk. The
argument on his side, insisting upon facts to support the
justification, would almost go to the length of asserting
that the plea would have been insufficient if it had
alleged that no one but the plaintiff had access to the
key. But can there be any doubt that the statement,
as made, goes far enough? Consistently with the pleas
another person might have had access to the key; but
it might have been under circumstances not raising the
remotest suspicion. I agree with Mr. *Prideaux* that the
mere belief of the defendant is not sufficient; but, in
addition to that, here are facts which shew that a rea-
sonable man might have believed as he did. As to the
putting in irons, it is justified as a reasonable mode of
detainer: and, after verdict, we must take that to have
been proved. There is something frightful in the idea of
being put in irons: but it is only a mode of detention;

and, if it was excessive, the plaintiff should have new
assigned.

Queen's Bench.
1852.

BROUGHTON
v.
JACKSON.

WIGHTMAN J. After verdict we need not consider some objections which might have been made to this plea on special demurrer. The jury have found that the defendant did believe that no person but the plaintiff could have had access to the key of the desk without his knowledge. Then look at the other circumstances on the record, adding that fact. The plaintiff had charge of the defendant's effects; the defendant had twice lost money shortly before the committing of the alleged trespasses: the plaintiff had access to the key of the desk from which the money was taken: and it may well be inferred from the statements that the key which the plaintiff had access to was the key with which the desk was opened. Sufficient ground, then, in fact, is stated for the suspicion. As to the putting in irons, the jury have found it to be a reasonable mode of detainer; and there is nothing before us to shew the contrary.

ERLE J. It appears sufficiently on the plea that the felony was committed by means of an instrument, and that the plaintiff had access to that instrument, and the defendant believed that he alone had such access. We need not consider to what extent, in a case of this kind, facts as well as suspicion must be shewn; here the facts are clearly sufficient. Suppose it appeared that the defendant had been robbed by a particular individual: that he had seen that individual, and that afterwards, seeing the plaintiff, he believed him to be the man. I cannot think that that would not be a sufficient justifica-

Volume XVIII. 1852. tion. On the point as to putting in irons, I agree in what has been already said.

BROUGHTON

v.

JACKSON.

CROMPTON J. I have had some doubt whether the grounds averred here were not too slight; but I think they are sufficient. It clearly would not be enough to say "I believed the plaintiff to be guilty;" a belief which might rest upon report, or conjecture, or clairvoyance. Actual ground of belief must be shewn. But here the defendant does shew it, by alleging that, just before the time in question, the plaintiff had charge of the desk and access to the key. The grounds of fact are rather slighter than in other cases which have been decided; but they are sufficient. As to the confinement in irons: it is enough, upon this record, if there were any possible circumstances under which it might be right to put any irons upon the plaintiff.

Rule discharged.

*Saturday,
April 24th.*

The QUEEN *against* the Inhabitants of SLAWSTONE.

Under stat.
11 & 12 Vict.
c. 31. s. 9.,
which provides
that a period of
fourteen days,
after "the

ON appeal against an order of two justices for the removal of *Thomas Ward*, his wife and children, from the parish of *Slawstone*, in the county of *Leicester*,

sending "a copy of the depositions on which an order of removal is made, shall be allowed for "the giving" notice of appeal, such notice, if sent by post under stat. 14 & 15 Vict. c. 105. s. 10., is to be considered as given on the day on which, by the ordinary course of post, it ought to have reached the party to whom it is sent, though in fact it arrive by the post on a later day.

to the parish of *Leverington Parson Drove*, in the county of *Cambridge*, the Sessions quashed the order, subject to the opinion of this Court upon the following case.

The order of removal was made at *Market Harborough*, *Leicestershire*, on 5th *August* 1851; and, on the 7th of the same month, notice of chargeability, and a copy of the order of removal, together with a statement of the grounds of removal, were sent by post from *Market Harborough* to the appellant parish. The solicitors for the appellant parish applied by letter, posted at *Wisbeach* on 26th *August*, to the clerk of the justices by whom the order had been made, for a copy of the depositions, which was sent to them in a letter posted at *Market Harborough* on 3d *September*, and received by the appellants' solicitors on 5th *September*.

On 17th *September* the solicitors for the appellant parish posted a letter at *Wisbeach*, containing a notice of appeal, which, in the regular course of post, ought to have arrived at *Market Harborough*, the post town for the respondent parish, on the 19th. On that day the pauper and his family were removed to the appellant parish. It appeared that the letter in fact reached *Market Harborough* upon the 20th.

On these facts it was contended, for the respondents, that the appeal should be disallowed, as the notice thereof had not been given within the prescribed time. The Sessions allowed the appeal and quashed the order.

If the Court of Queen's Bench should decide that the notice of appeal was given in due time, the order was to be quashed; if otherwise, the order to be confirmed.

Queen's Bench.
1852.

The QUEEN
v.
Inhabitants of
SLAWSTONE.

Q. B. EASTER TERM.

case XVIII. notice of appeal was given in time. Stat. 11 & 12 Vict.
1852. c. 31. s. 9. provides that a "period of fourteen days after
the sending of" the copy of the depositions "shall be
allowed for the giving of such notice of appeal." Now,
if by "the sending" is meant the putting the copy into
the post, then by "the giving" of the notice of appeal must be
meant the putting such notice into the post.
In that case the notice, which was posted on the 17th
September, was given within fourteen days of the sending
of the copy of the depositions, which was posted on the
3d. If, on the other hand, the fourteen days are to be
calculated from the day when the copy of the deposi-
tions was received by the appellants, namely 5th July,
then, as according to the ordinary course of post the
respondents would have received the notice on the 19th,
which would be fourteen days after, the notice must still
be held to have been given by the prescribed time.
Whichever mode of calculation be adopted, the same
terminus a quo must be given as regards the sending
both of the copy of the depositions and the notice of
appeal. [Coleridge v. J. Suppose the notice had been
put in the post, and never arrived at all.] In Bishop v.
Helps (a) it was held that, under the Registration Act,
6 & 7 Vict. c. 18., the posting of a notice of objection,
in sufficient time for it to arrive, in the ordinary course
of post, by a particular day, as required by sect. 100,
was a sufficient service of such notice on that day;
and that the fact of delivery of the notice within the
proper time was not essential. In Stocken v. Collis (b)
and Woodcock v. Houldsworth (c) the same principle
adopted with respect to notice of the dishonour of a

(a) 2 Com. B. 45.

(c) 16 M. & W. 124.

(b) 7 M. & W. 515.

The Queen
v.
Inhabitants of
Slawstone.

of exchange. And in *Dunlop v. Higgins* (*a*) it was held that a contract is sufficiently accepted by the posting of a letter declaring acceptance of it.

Queen's Bench.
1852.

The QUEEN
v.
Inhabitants of
SLAWSTONE.

Maunsell and O'Brien, contrà. The words "giving of such notice of appeal" in stat. 11 & 12 Vict. c. 31. s. 9. clearly mean the actual apprising of the respondents by the appellants that they intend to appeal, not merely the preliminary steps taken by the appellants for the purpose of such apprising. Notices and grounds of appeal could not be sent by post until the passing of stat. 14 & 15 Vict. c. 105., sect. 10 of which provides that "it shall be lawful and sufficient to send any notice of appeal against an order of removal, or statement of grounds of appeal against such order, by post or otherwise, in like manner as a copy of an order of removal and statement of grounds of removal may now be sent by law" (*b*). This section merely allows the substitution of the post for a special messenger: and, if a special messenger had taken more than the usual time in delivering the notice of appeal, it could not have been held that the notice was given at the time when it ought properly to have been delivered. [Lord Campbell C. J. The sender in such a case takes for granted the punctuality of the messenger: we must suppose the Legislature to take for granted the punctuality of the post.] The point of time from which the fourteen days are to be reckoned is the "sending" of the copy of the depositions; that is, the posting it. If the parties sending it do not receive a notice of appeal within fourteen days after such sending, they are entitled to remove the pauper. The language of the statute is different with respect to the

(*a*) 1 H. Lords Ca. 381.

(*b*) See stat. 4 & 5 W. 4. c. 76, s. 79.

Volume XVIII. copy of depositions and the notice of appeal; in the
 1852. former case it speaks merely of "sending," that is,
 _____ posting or putting into the hands of a messenger; in the
 The QUEEN v.
 Inhabitants of SLAWSTONE. latter case it uses the word "giving," which implies not
 only sending, but delivering. *Bishop v. Helps* (a) turned
 upon the language of a particular statute. By that Act,
 6 & 7 Vict. c. 18. s. 100., it is specially provided that
 the production, by the party posting a notice of objection
 to a voter, of the duplicate stamped and given back to
 him by the postmaster at the time of such posting, shall
 be evidence of the notice having been given to the
 voter on the day on which, by ordinary course of post, it
 would have reached him: and the chief question in the
 case was, whether a notice to the overseers, under sect.
 101, came within the same rule. Stat. 14 & 15 Vict.
 c. 105. contains no such special provision. *Stocken v.*
Collin (b), *Woodcock v. Houldsworth* (c) and *Dunlop v.*
Higgins (d) are not in point; they are all cases of mer-
 cantile transactions, where there is mutuality, which
 does not exist here.

Lord CAMPBELL C. J. It seems to me that there
 is no difficulty in construing stat. 11 & 12 Vict. c. 31.
 s. 9. The effect of that section is that a notice of
 appeal must be held to be given at the time when,
 according to the ordinary course of post (if it be
 sent by post, under stat. 14 & 15 Vict. c. 105. s. 10.), it
 would reach the party to whom it is sent. The notice
 in the present case, therefore, was given within the
 proper time. The same interpretation must apply to
 the word "sending," with respect to the copy of the
 depositions. Even if that word be held to mean the

(a) 2 *Com. B.* 46.

(b) 7 *M. & W.* 515.

(c) 16 *M. & W.* 124.

(d) 1 *H. Lords Ca.* 381.

mere posting, the rule must be reciprocal; and in that case, also, the notice will have been given in proper time. I am, however, clearly of opinion that the construction which I have first suggested is correct.

*Queen's Bench.
1852.*

The QUEEN
v.
Inhabitants of
SLAWSTONE.

COLERIDGE J. I am of the same opinion. The construction which we give to the statute carries out the intention of the Legislature, which was that appellants, after receiving a copy of the depositions, should have fourteen days to consider whether they would appeal or not. If they choose, as stat. 14 & 15 Vict. c. 105. s. 10. allows them, to send their notice by a public messenger instead of a private one, they are not responsible for the delay of the former, though they would be for that of the latter.

WIGHTMAN J. concurred.

(CROMPTON J. had left the Court.)

Order of Sessions confirmed.

The QUEEN *against* EDMUND WILLIAMS.

*Saturday,
April 24th.*

PASHLEY, in last Hilary Term, obtained a rule nisi to quash an order made by two justices for the

An order, made by two justices under the Tithe Commutation Act,

5 & 6 Vict. c. 54. s. 16., for payment, by way of contribution, of a proportion of rent charge on a close, after stating that complaint on oath had been made, before one of the said justices, of the several matters giving them jurisdiction to make the order, proceeded as follows: "And now at this day the said" (complainant and the party summoned) "appear before us the undersigned justices, and we (a), having examined into the merits of the said complaint, do, in pursuance of the statute in that case made and provided, determine that the just proportion" &c. "to be contributed by E. W." (on whom the order was made) "in respect of the said close" is &c. The order then declared the amount of the proportion payable, and ordered payment.

Held, that the order, upon the face of it, was insufficient, inasmuch as it did not shew any adjudication, express or implied, of the truth of the matters of complaint.

(a) "Now," in the order; but the Court treated this as a clerical error for "we."

Q. B. EASTER TERM.

county of Denbigh, dated 23d July 1851, as to the first proportion of a certain tithe rent charge to be contributed by the Reverend Edmund Williams in respect of a certain close called Erw Wen, and an order of direction of the said justices to the said E. Williams to pay to one Edward Hilditch 1l. 1s. in respect of the said close, and 6l. 18s. 6d. for costs.

The order was as follows.

"County of Denbigh } Be it remembered that," on 16th
to wit. } July 1851, at Denbigh, in the said
county, complaint on oath was made before John
Williams, &c. (a justice for the said county), by Edward
Hilditch, of Penywaen, in the parish of Llandyrnog, in
the county of Denbigh, farmer, that the farm yard, house,
buildings and land called Penywaen, situate in the said
parish of Llandyrnog, numbered consecutively 145—160
in the apportionment of the tithes of the said parish,
was charged with an amount of rent charge, namely
13l. 10s. 4d. per annum, and that such land belonged to
two landowners in several portions, that is to say, the
said farm house, buildings and land numbered 145—159
belonged to John Edward Madocks Esquire, and the
field, piece or parcel of land, called Erw Wen, and the
numbered 160 in the said tithe apportionment, belonged
to the Reverend Edmund Williams, of Pentre Mawr, in
the said parish of Llandyrnog, and that the said E.
Hilditch was tenant to the said J. E. Madocks for the
said farm and land except number 160; and that he had
paid to the proprieate rector of the said parish, and as
such owner of the said apportioned tithe, the whole
amount of such rent charge for the years 1849 and 1850,
and, in pursuance of the statute in that case made &c.,

he had, by a certain notice or instrument in writing, under his hand, and dated 5th July instant, and which had been duly served &c., demanded from the said *E. Williams* contribution towards such tithe rent charge for the said several years, in respect of the said field, &c., called *Erw Wen*, and numbered 160, the annual payment in lieu of tithes for which forms part of the said aggregate annual sum of 13*l.* 10*s.* 4*d.*, and which, in the calculation of the valuer and apportioner employed to apportion the said tithes, was estimated at 11*s.* per annum; and that, although the said *E. Williams* had been served with the said notice, he had neglected to make such contribution to the said complainant *E. Hilditch*; and that the said *John Williams* then issued his summons &c. (reciting summons to *Edmund Williams* to appear before two or more justices for the county of *Denbigh*, in order that they might examine into the complaint, and determine the proportion of the rent charge to be contributed by *E. Williams* as the owner of the said close). "And now at this day the said *E. Hilditch* and *E. Williams*, the parties aforesaid, appear before us the undersigned justices; and now, having examined into the merits of the said complaint, do, in pursuance of the statute in that case made and provided, determine that the just proportion so paid by the said *E. Hilditch* of the said rent charge to be contributed by the said *E. Williams* in respect of the said close called *Erw Wen*, and numbered 160, to be at the rate of 10*s.* 6*d.* per annum. And we do order and direct the said *E. Williams* to pay to the said *E. Hilditch* the sum of 1*l.* 1*s.*, being the amount paid by the said *E. Hilditch*, in respect of the said close called *Erw Wen*, two years ending the first day of *January* last past; and

Queen's Bench.
1852.

The QUEEN
v.
WILLIAMS.

Volume XVIII. also to pay to the said *E. Hilditch* the sum of *6l. 18s. 6d.*
1852. for his costs in this behalf, within ten days after service

The QUEEN
v.
WILLIAMS.

of this order upon the said *E. Williams*; and, in default of payment of the said several sums to the said *E. Hilditch*, we hereby further adjudge and order that the same be levied by distress upon the field, piece or parcel of land, called *Erw Wen*, being the land liable to the payment thereof." "Given under our hands and seals this 23d day of *July A.D. 1851*, at *Denbigh*, in the said county.

John Heaton.

John Williams."

The points relied on in support of the rule were, that the order was defective on the face of it, and contained no sufficient allegation of facts shewing jurisdiction in the justices; that it contained no adjudication whatever; that the determination of the just proportion to be contributed could not legally be made by the parties alleged in the order to have made the same; and that the order, in the ordering part thereof, did not pursue the statute in that behalf.

Welsby now shewed cause. The order is good. It is said to contain no adjudication as to the truth of the matters stated upon complaint. But the order recites that the justices have "examined into the merits of the said complaint;" that recital, coupled with the subsequent order, amounts to an adjudication that the matters stated upon complaint are true; and it is in accordance with sect. 16 of stat. 5 & 6 Vict. c. 54., under which the order is made, and which enacts that the justices, upon complaint made, "shall examine into the merits of the complaint, and determine

the just proportion of the rent charge" "which ought to be contributed."

*Queen's Bench.
1852.*

The QUEEN
v.
WILLIAMS.

Pashley, contrà. First, there is, on the face of the order, no adjudication at all by the justices. From the language of the order itself, it would appear that the adjudication was made by the complainant and the party summoned. [Wightman J. That is a mere clerical error; "now" has been written instead of "we."] Next, there is no adjudication as to the truth of the facts stated upon complaint. Such adjudication, at the most, appears only by implication; and that is not sufficient; the truth of the facts must be expressly adjudicated on in the order; *Rex v. Pitts* (*a*). In that case the order was an order of bastardy, made by two justices under stat. 18 *Eliz. c. 3. s. 2.*, which does not expressly prescribe an adjudication on the facts, as stat. 5 & 6 *Vict. c. 54. s. 16.* does. In the present case, therefore, such adjudication is still more requisite to the validity of the order. [Coleridge J. The proportion of rent charge to be contributed is expressly found; and so is the fact that such proportion had for two years been paid by the complainant.] The order does not even decide that *Williams* is the owner of the close. It declares that he is to pay "in respect of the said close;" but that is not a sufficient adjudication of ownership.

WIGHTMAN J. (*b*). I think the objection to this order is well founded. For anything that appears upon the face of the order, the justices may have taken for granted the truth of all the matters of complaint, and have

(*a*) 2 *Dong.* 662. See *Regina v. Lewis*, 8 *A. & E.* 881.

(*b*) Lord Campbell C. J. was absent.

Volume XVIII. determined the proportion of rent charge without further inquiry. There is no doubt that they ought

1852.
The QUEEN

v.
WILLIAMS.

to have adjudicated as to the truth of the facts stated upon complaint: the only question is, whether they have so adjudicated by implication. But to hold that they have, would be going farther than we are warranted in going by any case up to the present time "Having examined into the merits of the said complaint" may mean nothing more than, having heard what the respective parties had to say, upon the assumption that the matters of complaint were true I think, therefore, that the order, on the face of it, is insufficient.

CROMPTON J. concurred.

COLERIDGE J. I did not hear the whole of the argument; but, upon what I have heard, I am of the same opinion.

Rule absolute.

Wednesday,
April 28th.

SLATER, Appellant, and The Mayor, Aldermen
Burgesses of ASHTON UNDER LYNE, BROM
WALKER and WOOLLEY, Respondents.

Before the
passing of the
Towns Im-
provement
Clauses Act,
1847, 10 & 11
Vict. c. 34..

the borough of A. was divided into a town and a country district, each maintaining highways. That Act was incorporated in stat. 12 & 13 Vict. c. xxxv. (for the rest of the borough of A.), except so far as any thing in the former Act was varied.

ON notice of appeal against the aforesaid
a case was stated for the opinion of this Court
consent and order of a Judge.

The rate, made and published in *May 1851*, was intituled "An assessment to a highway rate of 7d. in the pound for the *Old Town* division of the borough of *Ashton under Lyne* by virtue of the 5 & 6 W. 4. c. 50., made by the town council of the borough of *Ashton under Lyne* as surveyors under The Towns Improvement Clauses Act, 1847, and The *Ashton under Lyne* Improvement Act, 1849." By this rate the appellant, *Edward Slater*, was assessed in the sums of 1s. 10d. and 9s. 4d., as the occupier of a shop and occupier and owner of a cottage, valued &c.

The other material facts appearing by the case were as follows.

The parish of *Ashton under Lyne*, in the county of *Lancaster*, consists of four divisions, called respectively The *Ashton Towns* division, The *Audenshaw* division, The *Hartshead* division, and The *Knott Lanes* division. Of these the *Ashton Towns* division is again subdivided into two districts or subdivisions, *The Old Town* and *The Demesne*. The municipal borough of *Ashton under Lyne* consists of the *Ashton Towns* division of the said parish (including the said two districts or subdivisions), and of part of the *Audenshaw* division. Up to the time of the passing and coming into operation of The *Ashton*

borough." Stat. 10 & 11 Vict. c. 34. s. 48. enacts that the Commissioners (that is the persons or body corporate entrusted to execute any local improvement Act incorporated with this) shall be the surveyors of all highways within the limits of such local Act, and shall have, within those limits, all the powers of surveyors; and that the inhabitants of the district within those limits shall not be liable to highway rate in respect of roads within other parts of the parish &c. in which the said district is situate. By sect. 49, the Commissioners are to be indictable for non-repair of any public highway within the limits of such local Act, in the same manner as the inhabitants thereof or of any parish &c. or other district therein were liable before the passing of such Act.

Held that the mayor, aldermen and burgesses of *A.* were bound, as Commissioners under the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34., to rate the whole borough for the repair of highways paved and certified under sects. 20, 24, of the local Act, and likewise to rate the whole for repair of the public highways not so paved and certified. And that a rate upon the country district alone, for repair of the highways within it (not paved or certified), was bad.

*Queen's Bench.
1852.*

*SLATER
v.
Mayor &c. of
ASHTON
UNDER LYNE.*

provided for by this. By the latter Act, sects. 20, 24, the mayor, aldermen and burgesses of *A.* were empowered to cause any street in the borough of *A.* to be sewered and paved, at the expense of the adjoining land-owners, and certify the same, when completed, to be a public highway: and sect. 25 enacted that it should be lawful for them from time to time to make a rate for the maintenance of such highways upon the occupiers of all houses &c. and lands "within the said

Q. B. EASTER TERM.

no XVIII.
1852.

SLATER

v.

Mayor &c. of
ASHTON

UNDER LYNE.

under Lyne Improvement Act, 1849, the said Audenshaw, Hartshead and Knott Lanes divisions maintained each separately its own highways, and had each separate surveyors; and the said Old Town and Demesne districts of the said Ashton Towns division maintained each separately its own highways, and had each separate surveyors.

The greater portion of the Old Town district of the borough of Ashton under Lyne is a country district. The Demesne district is nearly altogether covered by the town, and comprises a great quantity of houses and other rateable property.

After the passing of the Ashton under Lyne Improvement Act, the mayor, aldermen and burgesses required the surveyors of the Old Town and Demesne divisions respectively to hand over to them all books and papers in their power and custody as such respective surveyors: and the surveyors delivered the same accordingly.

Long before and at the time of the passing of the Ashton Improvement Act, and up to and at the time of the making and publishing of the rate now appealed against, there were, and still are, many public and common highways both in the Old Town division of the borough and in the Demesne division. Some of the highways within each division had been, before the making and laying of the rate, sewered, drained, levelled, flagged and otherwise completed to the satisfaction of the mayor, aldermen and burgesses, and were, after the passing of the Ashton Improvement Act and before the laying of the rate appealed against, declared to be so sewer'd, drained & to such satisfaction, and had been declared to be public highways, and have been kept in repair out of money under and by virtue of the 25th section of

last mentioned Act by the rates of *February* and *December* 1850, hereafter mentioned. Others of the highways within the said *Old Town* and *Demesne* divisions have never yet been sewer'd &c., paved and otherwise completed to the satisfaction of the said mayor &c., and have never yet been certified or declared to be sewer'd, &c., nor declared to be public highways within the meaning of the said Improvement Act.

In *May* 1851, and after the passing of the last mentioned Act, certain highways in the *Old Town* division, which were not at that time sewer'd &c. to the satisfaction &c., being then out of repair, the said mayor, aldermen and burgesses, assuming to be and acting as surveyors of the said *Old Town* division, assessed and laid the rate in question upon the rateable property in the said *Old Town* division for the repair only of such highways within that division as had not at the time of the assessing and levying of such rate been so sewer'd, drained, levelled, paved, flagged and otherwise completed; and at the same time, assuming to be and acting as surveyors of the *Demesne* division, they assessed and laid another rate upon the rateable property within the *Demesne* division for the repair of highways within that division exclusively, namely for the repair only of such highways then out of repair within that division as had not been at the time of the assessing and levying of the said rate sewer'd, drained &c. to such satisfaction as aforesaid.

The said respective rates are laid upon the rateable property within the said respective districts to the exclusion of all other rateable property within the said borough, but not within the said respective districts.

The respondents *Bromley*, *Walker* and *Woolley* are

Queen's Bench.
1852.

SLATER
v.
Mayor &c. of
ASHTON
UNDER LYNE.

Volume XVIII. respectively persons who occupy rateable property within
 1852. the said borough but not within the *Old Town* district or subdivision thereof, and who ought to be included in any rate made for the repair of highways and laid upon the said borough at large, but who ought not to be included in rates, if any, which can be legally assessed and laid upon the said *Old Town* district or subdivision exclusively of the rest of the borough.

SLATER
v.
Mayor &c. of
ASHTON
UNDER LYNE.

There is within the *Old Town* district land used as arable land only, land used as meadow land only, and land used as pasture ground only. The occupiers of these lands respectively are rated in and by the said rate according to the full net annual value of such respective lands; and this appears on the face of the said rate.

In *February* 1850, the mayor, aldermen and burgesses laid a highway rate of 2*d.* in the pound on all rateable property within the said borough, under the authority of the *Ashton Improvement Act*. The rate was headed: "Borough of *Ashton under Lyne* in the county of *Lancaster*. A certain pound rate of 2*d.* in the pound for raising money for answering and defraying the expences of carrying into execution the purposes of an Act of parliament made and passed in the 12th and 13th years of the reign of her present Majesty Queen *Victoria*, intituled" &c. (*Ashton Improvement Act*), "and called The Highway rate, made and levied upon the occupiers of all messuages, houses," &c. (according to the enumeration in sect. 25 of the Act; p. 407, post), "lands, tenements and hereditaments whatsoever, situate, standing and being within the said borough, according to the full net annual value of the same respectively. Dated the 13th day of *February*, 1850." This rate was collected early in 1850, and expended in the repair of

the highways throughout the whole borough, whether declared as such or not.

*Queen's Bench.
1852.*

In December 1850, the mayor, aldermen and burgesses laid another rate of 1*d.* in the pound, under the authority of the *Ashton Improvement Act*, which rate was headed: “An assessment to the highway rate for the borough of *Ashton under Lyne*, made this 11th day of December A.D. 1850, after the rate of 1*d.* in the pound, by virtue of the *Ashton under Lyne Improvement Act, 1849*.” This rate was laid on all the property within the whole borough, and expended in the repair of those highways only which had been declared as such under the Improvement Act, and which had been paved, sewered &c. to the satisfaction of the corporation.

*SLATER
v.
Mayor &c. of
ASHTON
UNDER LYNE.*

The *Ashton Improvement Act* applies to the same district as that comprised within the municipal borough of *Ashton under Lyne*, the limits of both being coextensive. The *Old Town* division, mentioned in the heading of the rate appealed against, is the same with the *Old Town* district or subdivision mentioned in this case. The mayor, aldermen and burgesses of the said borough of *Ashton under Lyne* are the Commissioners intrusted by the Improvement Act with powers for executing the purposes thereof; and they have no revenues, moneys or other means applicable to the repair of any highways within the said borough, except such moneys as they may be entitled to raise by rates under the several statutes in that behalf.

The question for the opinion of this Court was: Whether the mayor, aldermen and burgesses, in May 1851, under the *Ashton under Lyne Improvement Act, 1849*, and the Acts incorporated therewith, and the 5 & 6 W. 4. c. 50., or any or either of these Acts, or

Volume XVIII. respectively persons who occupy rateable r

1852.

SLATER

v.

Mayor &c. of
ASHTON
UNDER LYNE.

the said borough but not within the C
or subdivision thereof, and who oug^t f
any rate made for the repair of F
the said borough at large, br
included in rates, if any, wh
and laid upon the said OI
exclusively of the rest of

There is within th
arable land only, le
land used as pa
these lands resr
according to n costs, if any, as this Court sho
lands; and ourt to have full power of adjudicat

In Fe' costs of the appeal and case): and the
laid p amendable if, and as, this Court sho
pro^r t^r the sections of the Towns Improvement and As.
s^r Lyne Improvement Acts chiefly observed upon
the argument were the following.

Stat. 10 & 11 Vict. c. 34. (Towns Improvement
enacts:

Sect. 2. That, in this Act, "the expression 'The Commissioners' mean the Commissioners, trustees, or other persons or body corp intrusted by the special Act with powers for executing the pur thereof." And that The special Act "shall be construed to mean Act which shall be hereafter passed for the improvement or regulatⁱ any town or district, or of any class of towns or districts define comprised therein, and with which this Act shall be incorporated."

Sect. 3. That "the word 'Street' shall extend to and include any square, court, alley, and thoroughfare within the limits of the special

Sects. 47 to 56 are headed: "And with respect to paving and m^taining the streets, be it enacted as follows."

Sect. 47. "The management of all the streets which at the passir the special Act are or which thereafter become public highways, and

Volume XVIII. any other statute then in force, were entitled to assess and levy the said rate upon the rateable property within

1852.
Slate v.
Mayor &c. of Ashton under Lyne.

the *Old Town* division exclusively for the repair of such of the highways within that division as had not been at the time of the assessing and laying of that rate declared to be, and were not, sewer'd, drain'd, levelled, flagged, paved and otherwise completed. If the Court should be of opinion that they were so entitled, this rate was to be confirmed: if the Court should be of the contrary opinion, it was to be quashed: judgment to be entered on motion by either party at Quarter Sessions (as specified in the case) in conformity with the decision of this Court, and for such costs, if any, as this Court should adjudge (the Court to have full power of adjudicating upon the costs of the appeal and case): and the rate to be amendable if, and as, this Court should direct.

The sections of the Towns Improvement and *Ashton under Lyne* Improvement Acts chiefly observed upon in the argument were the following.

Stat. 10 & 11 Vict. c. 34. (Towns Improvement Act) enacts:

Sect. 2. That, in this Act, "the expression 'The Commissioners' shall mean the Commissioners, trustees, or other persons or body corporate intrusted by the special Act with powers for executing the purposes thereof." And that The special Act "shall be construed to mean any Act which shall be hereafter passed for the improvement or regulation of any town or district, or of any class of towns or districts defined or comprised therein, and with which this Act shall be incorporated."

Sect. 3. That "the word 'Street' shall extend to and include any road, square, court, alley, and thoroughfare within the limits of the special Act."

Sects. 47 to 56 are headed: "And with respect to paving and maintaining the streets, be it enacted as follows."

Sect. 47. "The management of all the streets which at the passing of the special Act are or which thereafter become public highways, and the

pavements and other materials, as well in the foot ways as carriage ways, of such streets, and all buildings, materials, implements, and other things provided for the purposes of the said highways, by the surveyors of highways or by the Commissioners, shall belong to the Commissioners."

*Queen's Bench.
1852.*

Sect. 48. "The Commissioners, and none other, shall be the surveyors of all highways within the limits of the special Act, and within those limits shall have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways are invested with or subject to by virtue of the laws for the time being in force; and the inhabitants of the district within the said limits shall not, in respect of any lands situate within the said district, be liable to the payment of any highway rate, grand jury cess, or other payment in respect of making and repairing roads within the other parts of the parish, township, barony, or place in which the said district or any part thereof is situate."

*SLATER
v.
Mayor &c. of
ASHTON
UNDER LYNE.*

Sect. 49. "The Commissioners shall be deemed guilty of a misdemeanour for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanour in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act."

Sect. 167. "Every rate which the Commissioners are by this or the special Act authorized to make or levy shall be made and levied by them at yearly, half yearly, or such other periods, as they think fit, upon every person who occupies any of the prescribed kinds of property, or (if no property be prescribed) any house, shop, warehouse, counting house, coach house, stable, cellar, vault, building, workshop, manufactory, garden, land, or tenement whatsoever (except as hereinafter is excepted), within the limits of the special Act, or of the district where such rate is assessed on the occupiers of lands and buildings of a separate district as hereinbefore provided, according to the full net annual value thereof respectively; and the said rates shall be vested in the Commissioners, and shall be payable at such times as they appoint." Proviso, as to the proportion in which certain descriptions of land shall be rated.

Sect. 199. "The several persons who at the time of the passing of the special Act are surveyors of highways for any township, or other district within the limits of the special Act, may proceed for the recovery of any highway rate made in such township or district, and then remaining unpaid, in the same manner as they might have done if this and the special Act had not been passed, and they shall apply the money which they so recover, in the first place, in reimbursing themselves any expences which they have incurred as such surveyors as aforesaid, and in discharge of any debts legally owing from them in respect of the highways within such township or district; and the surplus, if any, arising from any buildings or lands within the limits of the special Act, or a proportionate part thereof, shall be paid by them to the treasurer to the Commissioners, and shall be applied to the same purposes

Volume XVIII. as the rates by this or the special Act authorized to be levied are directed
1852. to be applied."

SLATER
v.
Mayor &c. of
ASHTON
UNDER LYNE.

Stat. 12 & 13 Vict. c. xxxv., local and personal, public
(*Ashton under Lyne Improvement Act*), enacts:

Sect. 13. "That the Towns Improvement Clauses Act, 1847, the Town Police Clauses Act, 1847, and the Markets and Fairs Clauses Act, 1847, shall, except in so far as herein varied or otherwise provided for, be incorporated with and form part of this Act."

Sect. 20. "That if any street or part of a street, whether the same be a public highway or not, and whether the same be already or shall at any time hereafter be laid out and opened to the public within the said borough, be not or shall not be sufficiently sewer'd, drain'd, levelled, flagg'd, paved, and otherwise completed to the satisfaction of the mayor, aldermen, and burgesses, it shall be lawful for the mayor, aldermen and burgesses at any time, and from time to time after the passing of this Act, notwithstanding the provisions of the Towns Improvement Clauses Act, 1847, incorporated herewith, to order that any such street or part thereof shall be freed from obstruction, sewer'd, drain'd, levelled, flagg'd, paved, and otherwise completed according to such plan, on such level, in such manner, of such materials, and within such time as they shall direct, and thereupon the respective owners of the buildings and lands lying alongside of or adjoining to such street or part of a street (notwithstanding any part of such street may include, pass over, lie opposite, or be adjacent to any cross or other street, or any part thereof) shall, according to such plan, on such level, of such materials, within such time, and in such manner as shall be expressed in such order, at their respective charges and expenses, remove all obstructions, and well and sufficiently sewer, drain, level, flag, pave, and otherwise complete such street, so far as the same extends along their respective buildings or lands; and in the event of such owners or any of them making default in the due execution of such work within such time as aforesaid, the mayor, aldermen, and burgesses may cause such work to be executed, and may recover the expense incurred by them in respect thereof in the manner directed by the provisions of the Towns Improvement Clauses Act, 1847, with respect to ensuring the execution of the works by that or the special Act required to be done by the owners or occupiers of houses or lands, so far as such provisions apply to the recovery of the expense of works required to be done by owners, and except in so far as such provisions authorize the recovery of such expense by drainage rates."

Sect. 24. "That when and so soon as any street already made or hereafter to be made within the said borough shall have been sewer'd, drain'd, levelled, flagg'd, paved, and otherwise completed to the satisfaction of the mayor, aldermen, and burgesses, then and in each such case it

Queen's Bench.
1852.

SLATER
v.
Mayor & c. of
ASHTON
UNDER LYNE.

shall be lawful for the mayor, aldermen, and burgesses, and they are hereby required, to certify and declare the same to be a public highway, and after such certificate and declaration the same shall be a public highway; and the same, together with the main sewer under the same, shall be for ever afterwards repaired and repairable as such out of the highway rate hereinafter provided; and every such certificate and declaration shall be recorded in the books of the mayor, aldermen, and burgesses."

Sect. 25. "That for the purpose of maintaining and repairing the present highways within the borough when so sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction" &c. "as aforesaid, and such of the present and future streets as shall from time to time be declared public highways as aforesaid, and the main sewers under the same, it shall be lawful for the mayor, aldermen, and burgesses, when and so often as they shall think necessary, to order and direct a rate or assessment, to be called the "Highway Rate," to be made and levied upon the occupiers of all messuages, houses, shops, workshops, offices, counting houses, warehouses, cellars, vaults, manufactories, foundries, breweries, mills, stables, coach houses, collieries, canals, railways, gas works, water works, buildings, erections, yards, gardens, curtilages, lands, tenements, and hereditaments whatsoever already built, erected, or situate, or which shall hereafter be built, erected, or situate, within the said borough, according to the full net annual value of the same respectively (excepting as hereinafter mentioned), anything contained herein or in any other Act to the contrary notwithstanding; provided" that such Highway rate shall not in any one year exceed 1s. in the pound upon such annual value.

Sect. 50. "That nothing herein contained shall be held to alter, diminish, or affect any of the powers, privileges, and authorities vested in the mayor, aldermen, and burgesses by or in pursuance of any of the Acts, of parliament now in force, or which may be hereafter enacted in relation to municipal corporations, or by or in pursuance of the aforesaid charter of incorporation" (of the borough of *Ashton under Lyne*, granted in 1847, and referred to in sect. 1 of this Act); "and, except in so far as herein otherwise provided, the said powers, privileges, and authorities shall extend and apply to the objects and purposes of this Act, and may be exercised in the execution of or otherwise in relation to such purposes (a)."

Cowling, for the respondents. The rate was rightly laid by the mayor, aldermen and burgesses, as surveyors of highways, upon the *Old Town* division exclusively. Under stat. 10 & 11 Vict. c. 34. s. 2., which is incorpo-

(a) A few more clauses of both Acts were cited in argument, which it is not thought necessary to set forth at large.

Volume XVIII. rated with the *Ashton Improvement Act*, they, being
1852. the "body corporate intrusted by the special Act with
SLATER powers for executing the purposes thereof," have the
v.
Mayor &c. of authority which is vested in "Commissioners" by the
ASHTON
UNDER LYNE. first mentioned Act. That authority, as to the matter
now in question, is marked out by sects. 47, 48, 49, of
stat. 10 & 11 *Vict. c. 34.* "The Commissioners, and
none other," are to be "surveyors of all highways within
the limits of the special Act;" that is, not to exercise
the jurisdiction of surveyors indiscriminately over the
whole division which is comprised in stat. 12 & 13 *Vict.*
c. xxxv., but to act in any district of that division as the
surveyors of such district might have done before the Act
of 10 & 11 *Vict.* passed. And the case states that, before
the passing of the *Ashton Improvement Act*, the *Old Town*
district maintained its highways separately, and had its
own surveyors. By sect. 49 the Commissioners are in-
dictable for non-repair of any public highway within the
limits of the special Act, as the inhabitants thereof, "or
of any parish, township, or other district therein," would
have been before the passing of the special Act. The
words "or of any parish" &c. would be inconsistent if
the Commissioners were now surveyors for the entire
division. The language of sects. 161, 162, and the pro-
visions of sect. 199, are adverse to such a construction.
And the Act makes no provision authorizing a general
rate for the highways, or any such rate which might not
before have been laid by the surveyors respectively.
All the power of the Commissioners in this behalf is
merely incidental to their character of surveyors. As
to the local Act, 12 & 13 *Vict. c. xxxv.*: the provision
of sect. 25 for levying a highway rate takes effect upon
the entire division within which highways are paved,

sewered &c. to the satisfaction of the mayor, aldermen and burgesses; but the highways of the rural district, which have not been paved &c., continue to be repairable under the former highway law. The local Act does not introduce any obligation to pave and sewer the whole borough: it is discretionary; and the paving &c. may, in any part, remain undone. Sect. 20 provides that, if "any street or part of a street" be not properly sewered, flagged &c. to the satisfaction of the mayor, aldermen and burgesses, they may "at any time, and from time to time," order it to be done; but nothing is said as to repair of ways which are not to be sewer'd, flagged, &c. The others being expressly mentioned, the inference is that these were intended to be repaired as before. [Erle J. Your argument is that all the divisions in which streets are paved must contribute to the paving, but that the rate for unpaved ways must be paid by that district only in which they lie: so that the inhabitants of that district are liable for both repairs; the rest of the division not.]

*Queen's Bench.
1852.*

SLATER
v.
Mayor &c. of
ASHTON
UNDER LYNE.

Hugh Hill, contra. First, it may be a question whether the general power, given to Commissioners, of acting as surveyors, by the Towns Improvement Act, 10 & 11 Vict. c. 34. s. 48., is extended to the mayor, aldermen and burgesses by the operation of stat. 12 & 13 Vict. c. xxxv., inasmuch as that Act, by sect. 13, incorporates the Towns Improvement Act "except in so far as herein varied or otherwise provided for." And, secondly, if they have that power as "Commissioners," whether the exercise of it with respect to streets (which, by sect. 3 of the former statute, mean "any road" &c. "and thoroughfare within the limits of the special Act") be

Volume XVIII. not a matter which is "varied" by stat. 12 & 13 Vict. c. xxxv.
1852.

SLATER
v.
Mayor &c. of
ASHTON
UNDER LYNE.

This last statute, sect. 20, gives them compulsory and discretionary powers with respect to streets not yet sewered, flagged &c.; but, with respect to any street which already was so at the passing of the Act, no discretion is allowed; if it is satisfactorily completed, the mayor, aldermen and burgesses are "required" (sect. 24) to certify and declare the same to be a public highway; and the same shall then be a public highway and be for ever repairable out of the highway rate after mentioned. Then sect. 25 enacts that, for the purpose of maintaining "the present highways within the borough" when so sewered, flagged &c., and "such of the present and future streets as shall from time to time be declared public highways as aforesaid," the mayor, aldermen &c. may raise a rate, to be called "The Highway rate," to be levied upon the occupiers of all messuages, lands &c. "within the said borough." The Legislature, when using these words, cannot have intended that one, or two, highway rates were to be levied according to circumstances. "The highway rate" must comprehend all the highways within the limits of the special Act. [Lord Campbell C. J. Can the ways referred to be repaired and maintained under this clause till it is certified that they are completed according to sect. 24; and does not this require that they shall be sewered, flagged &c.?] The repair might be according to the condition of the street; when it was sewered, the sewerage to be maintained; when paved, the paving. [Wightman J. The street is to be certified when it is sewered, flagged, &c. "and otherwise completed."] There is a clause (sect. 31) in stat. 12 & 13 Vict. c. xxxv., which gives the mayor, aldermen and burgesses power to levy rates (called, in the margin of the clause,

"Improvement rates") on all messuages, lands &c. within the borough "for carrying into execution the purposes of this Act, so far as not otherwise provided for herein or in the Acts incorporated herewith." If the cases suggested are not met by sect. 25, this clause may remove the difficulty. The rate now laid is not consistent with stat. 10 & 11 Vict. c. 34. s. 48. That makes the Commissioners surveyors, generally, of the district within the limits of the special Act, and gives them the power of surveyors within those limits, and over the inhabitants of that district. It does not authorize separate rates upon the inhabitants of the several townships within the district. [Lord *Campbell* C. J. Sect. 49 makes the Commissioners indictable for non-repair of any public highway within the limits, "in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act."] That clause only points out the mode of prosecuting, and the kind of liability to which the Commissioners are subject. The words cited do not imply that the parish, township or other district shall still be liable; but only that the liability which it formerly was under shall now attach to the Commissioners in respect of every part of the division. Sect. 50 forbids the trustees of any turnpike road within the limits of the special Act to collect toll on such road, or lay out money upon it. Sect. 199 directs the persons who are local surveyors at the time when the special Act passes to recover the highway rates for their respective districts, and, first applying the money to the discharge of their expenses and of debts due from them in respect of their highways, pay over the surplus to the treasurer of the Commissioners, to be applied, generally, to the same

Queen's Bench.
1852.

SLATER
v.
Mayor &c. of
ASHTON
UNDER LYNE.

Volume XVIII. purposes as the rates which are to be levied under this
1852.

~~SLATER
v.
Mayor &c of
ASHTON
UNDER LYNE.~~ or the special Act: the intention evidently being that the several funds shall be united into one for the limits within which the Commissioners officiate. Where special rates are contemplated for the future, express provisions are made, as in the case of private improvement expences, sect. 156, and the cost of sewers, sects. 28, 29, 157.

Cooling, in reply. Sect. 48 of stat. 10 & 11 Vict. c. 34. substitutes the Commissioners for the surveyors, but makes no change as to the parties who shall be rateable. "Within those limits" means within every part of them, respectively. If the Commissioners were indicted under sect. 49 for non-repair of highways, it could not be alleged that they were liable from time immemorial to repair the highways in the entire district. [Lord *Campbell* C. J. The argument on the other side assumes that, since this statute, the custom in smaller districts is at an end. *Wightman* J. The provisions in sects. 161, 162, for making special rates, seem to imply that, except in those cases, one rate would be made for the whole division.] Those enactments may refer to rates made for particular purposes, as the sewer rate under sect. 158. Sect. 199 merely provides for a state of things in which the former system would be overridden, as to the persons who were to levy the rates.

Lord *CAMPBELL* C. J. I am of opinion that the rate cannot be supported: but I do not decide this on the ground taken by Mr. *Hill*, that the Commissioners can raise only one rate, to be applied both to the rural and

to the urban ways. Sect. 25 of stat. 12 & 13 Vict. c. xxxv. does not bear that construction. The highway rate there mentioned is to be raised for maintaining the highways within the borough "when so sewered, drained, levelled, flagged, paved, and otherwise completed" "as aforesaid;" not till then. It is to be a rate for the urban ways. Then, looking to the general as well as the special Act, we find that the Legislature provides for two general rates, each extending over the whole borough. One, as already mentioned, is for the urban ways, and to that the rural part of the borough is contributory; for the rate, under sect. 25, is upon the occupiers of "lands" generally. Then justice requires that the urban part should also contribute to the rural part; and that object is gained by sect. 48 of stat. 10 & 11 Vict. c. 34., which enacts that the Commissioners shall be the surveyors of all highways, and have all the powers of surveyors of highways, within the limits of the special Act, and that the inhabitants of the "district" within the said limits shall not, in respect of any lands within such district, be liable to highway rate for making and repairing roads within the other parts of the parish &c. in which the district or any part thereof is situate. It seems to me that this gives the Commissioners power to rate the borough generally for the repair of rural roads within it, treating it as one district, though it may have consisted of separate ones before the Act passed. Mr. *Cowling* was not able to deny that, if part of such a district were brought within the borough and part not, the urban part of the borough would be rateable for repair of the portions of road in the part so brought in: yet no express power is given for this purpose. Sect. 49 supplies it, by providing that

*Queen's Bench.
1852.*

SLATER
v.
Mayor &c. of
ASHTON
UNDER LYNE.

Volume XVIII. the Commissioners shall be indictable for non-repair of
1852. any public highway within the limits of the special Act,

SLATER
v.
Mayor &c. of
ASHTON
UNDER LYNE. "as the inhabitants thereof, or of any parish, township or other district therein, were liable before the passing of the 'special Act.' It is unnecessary to go into the other clauses; all of them are reconcileable with the position that there are to be two rates, one for the urban and one for the rural part, and that all the property in the borough shall be contributory to both rates.

WIGHTMAN J. I am of opinion that this rate is bad, because laid for a part of the borough only. Taking all the provisions together, there are two rates, applicable to different descriptions of repairs: a rate for the street part of the highways, to which all the borough contributes, and a rate for the other highways: and, as the inhabitants of the rural part of the borough are bound to contribute to the repair of the streets, it is a just reciprocity that the other inhabitants of the borough should contribute to the repair of those highways which are not street. It would be a hardship if that were not so. Under sect. 48 of stat. 10 & 11 Vict. c. 34. the Commissioners have the powers of surveyors, generally; and among those is the power of laying a highway rate. If there is any difficulty in the case it arises from sect. 49; but that is to be explained in the manner pointed out by my Lord.

ERLE J. The words used by the Legislature admit of the construction that the borough is to be one entire district: and an argument almost conclusive arises from the several enactments, that the Commissioners are bound

to make the whole contributory to both rates. If it were otherwise, the rural part of the borough, after contributing to the repair of the urban ways, as it is bound to do, would have to repair its own without any contribution from the urban part. It is argued that sect. 49 contemplates a continuance of the former separation of districts: but that would be a great complication for no intelligible purpose. On the other construction no inconvenience arises; and it is greatly recommended by the consideration that it does away with all difficulty which there might be in stating the liability on an indictment (a).

*Queen's Bench.
1852.*

SLATER

v.

Mayor &c. of
ASHTON
UNDER LYNE.

Judgment for the appellant, with costs.

(a) Three Judges only were present.

TALLIS *against* TALLIS.

*Thursday,
April 29th.*

Reported (on motion to set aside demurrer) 1 *E. & B.*
397, note (a).

Volume XVIII.
1852.

Thursday.
April 29th.

The QUEEN against The Justices of SUFFOLK.

During the trial of an appeal against an order of removal, at the County Quarter Sessions, which was confirmed with costs, *F. S.*, one of the magistrates for the county, and a rated inhabitant of the appellant parish, sat on the bench, and on several occasions spoke to the chairman, and referred to documents put in evidence. The presence of *F. S.* being objected to, on the ground that he was an interested party, he admitted the fact; and the chairman

stated that *F. S.* would take no part in the proceedings: but he remained in court till the decision of the appeal. No further objection was made. On motion for a certiorari, *F. S.* stated, on affidavit, that, although he did speak to the chairman, and refer to documents, during the trial, he did not vote or give any opinion on the question before the court, or influence the decision of the other magistrates; and that, if the chairman and he had not believed that his presence on the bench, after his statement that he would not interfere, had been acquiesced in, he would have retired from the court during the trial.

Held, that his presence, under those circumstances, rendered the proceedings invalid.

The notice of application for a certiorari, under stat. 13 G. 2. c. 18. s. 5., was sworn to have been served on *F. S.* and another justice "who were present at the Sessions" "when the appeal mentioned in the said notice was heard, and were and are two of the justices" "by and before whom the order of Sessions mentioned in the said notice was made." The notice was signed by *J. M.*, "attorney for the inhabitants of" the respondent parish.

Held: 1. That the service was sufficient, inasmuch as *F. S.*, under the circumstances, must be considered as a member of the court, and one of the justices who made the order:

2. That the signature was sufficient.

O'MALLEY, in last Hilary Term, obtained a rule nisi for a certiorari to remove into this Court an order of the Ipswich Quarter Sessions quashing an order of two justices for the removal of *William Garrard*, a pauper, and his wife and children, from *Needham Market*, in the parish of *Barking*, in *Suffolk*, to the parish of *Haughley*, in the same county.

The affidavits in support of the rule stated that, on the hearing of the appeal against the said order, several questions of law and fact were raised and discussed; and that eventually the appeal was allowed, and the order of removal quashed with costs. That, during the discussion of the said questions of law and fact, the Rev. *Francis Steward*, one of the justices for the county, sat on the bench next to the chairman, and took an active part during the arguments, and, upon five or six occasions, entered into conversation with the chairman, and referred him to the particulars of the documents

put in evidence, apparently in support of the argument for the appellants. That the said *F. S.* is rector of the parish of *Barking cum Needham Market and Downsden* (above mentioned), and was directly interested in the decision of the Court, inasmuch as there is only one poor rate made for the whole of the said parish, and the said *F. S.* is rated therein as an occupier and owner. The affidavits further stated that the notice, required by stat. 13 *G. 2. c. 18. s. 5.*, of the application for a certiorari was served on the said *F. S.* and on the Hon. and Rev. *Frederick De Grey*, who "were present at the Sessions" "when the appeal mentioned in the said notice was heard, and were and are two of her Majesty's justices of the peace in and for the said county, by and before whom the orders of Sessions mentioned in the said notice were made;" and that the notice was signed "*John Marriott*, attorney for the inhabitants of the said parish of *Haughley*."

The affidavits in answer, by the chairman, the said *F. S.*, and other magistrates present at the hearing of the appeal, stated that, while the arguments upon the said objections were proceeding, counsel for the respondents observed to the Court that the said *F. S.*, who was then sitting on the bench, was a rated inhabitant of the hamlet of *Needham Market* (*a*), and, as such, ought not to take any part in the trial: that the chairman then inquired of the said *F. S.* whether he was such rated inhabitant; and that, he having replied in the affirmative, the chairman assented to the correctness of the counsel's observation, and further stated that the said *F. S.* would take no part in the hearing or decision of the appeal. That the chairman and the said *F. S.* believed counsel to have been satisfied with such statement, and that otherwise the said *F. S.* would have

Queen's Bench.
1852.

The QUEEN
v.
Justices of
SUFFOLK.

(a) Viz. to the rate of the parish of which the hamlet was part.

Volume XVIII.
1852.

The QUEEN
v.
Justices of
SUFFOLK.

withdrawn. That the decision of the Court on the several points was come to by the chairman and three other justices (the said *F. S.* not being one) without retiring, and without conferring with or being influenced by the said *F. S.*, or by his presence, and without any vote or opinion being given by him. Mr. *Steward*, in his affidavit, stated that he probably did, during the trial of the appeal, speak to the chairman, and refer to some papers lying before him; but that he abstained altogether from giving any opinion upon, or taking any part in the decision of, any question at issue, or having any conversation with the chairman or the other magistrates on the subject of the appeal.

Couch now shewed cause. First, the mere fact of Mr. *Steward* being a rate payer was not sufficient to disqualify him from taking a part in the discussion. In *Regina v. Justices of Hertfordshire* (*a*), which will probably be relied on by the other side, the magistrate was one of the justices who had made the order which was appealed against. [Lord *Campbell* C. J. If a magistrate is, in any way, personally interested in the question before the Court, he ought not to take part in the proceedings.] Next, assuming that Mr. *Steward* had no right to interfere, there is nothing to shew that he did take any part in the proceedings. He was certainly present: but he was present because the parties making the objection acquiesced in his remaining on the bench, after he had admitted that he was a rate payer. His mere presence was immaterial, unless he actually interfered in and influenced the decision, which he swears that he did not. [Lord *Campbell* C. J. He

takes upon himself to say that he did not influence the decision; but he admits that he spoke to the chairman and referred to documents. Surely that is an interference in the discussion.] That seems to have been before the objection was made. Further, the notice of the application for a certiorari is insufficient. It is sworn to have been served on Mr. *Steward* and another magistrate, "who were present at the Sessions" "when the appeal mentioned" &c. "was heard, and were and are two of Her Majesty's justices" "by and before whom the orders of Sessions mentioned in the said notice were made." But in *Regina v. Justices of Herefordshire* (*a*) it was held that the order must be sworn to have been served on the justices by whom it was actually made; and, in *Regina v. St. James, Colchester* (*b*), the fact of the name of a justice appearing in the caption was deemed no evidence of his having been one of the justices making the order. In the present case it appears that the decision of the Court was arrived at by the chairman and three other magistrates, Mr. *Steward* taking no part in the proceedings. He certainly was present; but, if he did not interfere, the order cannot be said to be made by him, any more than if he had left the Court before the decision was made. [Lord *Campbell C. J.* That would be a very different case.]

Lastly, the notice ought to specify the parties who apply for the writ of certiorari; *Regina v. How* (*c*). Here it is signed on behalf of "the inhabitants" of *Haughley*. The inhabitants, as a body, cannot appeal; *Regina v. Colbeck* (*d*). In *Regina v. St. James, Colchester* (*b*), the notice was signed by the attorney on behalf of a par-

Queen's Bench.
1852.

The **QUEEN**
v.
Justices of
SUFFOLK.

(*a*) Note (*a*) to *Regina v. Darton*, 2 *D. & L.* 500.

(*b*) 2 *Lowndes, M. & P.* 314. See *S. C.* 14 *L. J. (N. S.) M. C.* 203.

(*c*) 11 *A. & E.* 159.

(*d*) 12 *A. & E.* 161.

Volume XVIII. ticular inhabitant. In the present case no one would
 1852. be liable for costs. [*Wightman* J. The attorney would

The QUEEN
 v.
 Justices of
 SUFFOLK.

be responsible.]

O'Malley and *Power*, contra, were stopped by the Court.

Lord CAMPBELL C. J. This rule must be made absolute. I am glad, for the sake of a pure administration of justice, that the application has been made. The proceedings in question are much to be censured. Mr. *Steward*, as a rated inhabitant of the appellant parish, was clearly interested in the appeal. If he had done his duty, he would have withdrawn from the Court during the hearing of the appeal. When I was Chancellor of the Duchy of *Lancaster*, I withdrew from the judicial committee of the Privy Council during the hearing of a case in which the interests of the Duchy were concerned (*a*). A few days ago (*b*) my brother *Crompton* withdrew from the Court while a case was before it in which he had been engaged as counsel when at the bar. Mr. *Steward*, when his presence is objected to, declares that he will not interfere; so far, and so far only, there appears to have been an acquiescence in his remaining; but he afterwards does interfere, and remains until the appeal is decided, although he takes upon himself to declare that his presence and interference did not influence the decision. He did not vote; nor was there any voting; but he remained in Court, as a member of it; and therefore his presence vitiated the proceedings. With respect to the objection that the service of the notice was insufficient, I quite agree with the decision

(*a*) *Dyke v. Walford*, 5 *Moore's Pr. C. Ca.* 434.

(*b*) See p. 297, note (*a*), *antè*.

of my brother *Patteson* in *Regina v. Justices of Herefordshire* (a); but there the magistrate had not interfered in any way with the proceedings, and was in Court merely as a bystander. Mr. *Steward* remained on the bench till the appeal was decided; and he must therefore be held to be one of the justices by whom the order was made. The objection as to the signing of the notice has been already answered.

*Queen's Bench.
1852.*

The QUEEN
v.
Justices of
SUFFOLK.

WIGHTMAN J. I am entirely of the same opinion. It is very important that no magistrate who is interested in the case before the Court should interfere, while it is being heard, in any way that may create a suspicion that the decision is influenced by his presence or interference. Mr. *Steward*'s presence and interference was sufficient to create such a suspicion. As to the objections with respect to the notice, I also agree with my Lord Chief Justice.

CROMPTON J. The only question is, whether, during the hearing of this appeal, a magistrate who was interested interfered. Mr. *Steward* admits that he interfered, but states that, in his opinion, he did not influence the decision. That is nothing to the point; if he interfered at all, that vitiates the proceedings (b).

Rule absolute, without costs (c).

(a) Note (a) to *Regina v. Darton*, 2 D. & L. 500.

(b) No fourth Judge was present.

(c) The above case was referred to on a subsequent day of the term, in

The QUEEN against The Justices of LONDON.

*Wednesday,
May 5th.*

ARTHUR MACNAMARA was convicted by *Samuel Wilson*, Esquire, an alderman of *London*, under stat. 5 & 6 Vict. c. 79. (see sect. 15), of having used a stage carriage, of which he was the proprietor, for the part of the hearing of an appeal is not sufficient ground for setting aside an order of Sessions made on such hearing, if it be expressly shewn that he took no part in the hearing, came into Court for a different purpose, and did not in any way influence the decision.

Volume XVIII.
1852.

The QUEEN
v.
Justices of
LONDON.

conveyance of passengers, having thereon words specifying that it was constructed to carry thirteen passengers inside, whereas it was not truly constructed for carrying that number inside according to the regulations of the statute, and whereas the said carriage could not nor would contain &c. (the defect was then specifically described). The conviction was confirmed, on appeal, at the Guildhall Sessions; and the defendant, in last Hilary term, obtained a rule nisi to remove the conviction and order of Sessions into this Court for the purpose of their being quashed.

His affidavit in support of the rule stated that the information (according to his belief on grounds which he stated) was exhibited at the instigation of Mr. Wilson; that Mr. Wilson, on the hearing, took an active part against the deponent in several respects, which were mentioned; and that, on deponent's stating that he should appeal, Mr. Wilson gave orders to Mr. Pearson, the City solicitor, to prosecute and oppose the appeal, and Mr. Pearson did accordingly conduct the proceedings in support of the conviction for the said Alderman Wilson as respondent. That, at the Guildhall January Sessions, 1852, the carriage (an omnibus) was produced, on notice from Mr. Pearson, for the inspection of the justices. That, "for some time previously to and for some time after the said appeal came on to be heard and was heard, the said Alderman Wilson was sitting on the bench of magistrates at the said Sessions, and, part of the time during the hearing of the said appeal, was conversing with Mr. Alderman Finnis, another alderman of the said city and one of the justices sitting on the said bench, and by whom the said appeal was, with other aldermen and justices, determined." That, in the course of the hearing, the justices left the bench to inspect the carriage, which was standing in the Guildhall yard; and that Alderman Wilson went into the carriage with them; and that, upon deponent and two coach builders going in also to explain the construction, Mr. Wilson ordered them out, and remained in the carriage for some minutes afterwards, in conversation with the justices. That he afterwards went with them into another omnibus, and then returned with them into the Guildhall, and sat on the bench with them, and in conversation with Alderman Finnis, for some time, and did not leave the Court till after several witnesses had been examined.

Alderman Wilson made affidavit in answer that, in consequence of a complaint made to him by a passenger, he directed an officer attending the Justice room, Guildhall, to examine Macnamara's omnibus, and, if the complaint appeared well founded, to get a summons issued. That the information was preferred in consequence, and a conviction obtained. That the deponent sent the proceedings to the City solicitor in order that he might appear in support of the conviction in case of appeal, as is usual in cases where the public interests are concerned. That the Quarter Sessions at Guildhall were held on January 10th, at ten o'clock; and that a Petty Session was appointed for eleven on the same day, at which Alderman Wilson sat as justice. That he went into the Court of Quarter Sessions,

but withdrew before the appeal came on. That, on his way to the Common Pleas Court, where the Petty Sessions were held, he saw the omnibus in the Guildhall yard, and persons collected round it; and that certain aldermen and the Recorder were then inside the omnibus. That Alderman *Wilson* said to *Macnamara*, who was keeping the door of the carriage, "I suppose Mr. *Macnamara* would not like me to get in;" to which he answered, "Oh yes I should, sir, pray get in," and assisted Alderman *Wilson* to enter the omnibus, and got in also himself: that other persons did the same, but were desired by one of the aldermen to withdraw, which they, and *Macnamara* also, did, but not by *Wilson's* desire. That Alderman *Wilson*, while in the omnibus (where he remained a few minutes), pointed out the seat complained of to the Recorder, but made no observation upon the merits of the appeal, and had no communication or conversation with the Recorder and aldermen beyond directing attention to the seat in question. That he went into the other carriage with them, at *Macnamara's* request, for the purpose of inspecting a seat differently constructed, but had then no other communication with them than as above mentioned; and that his being with them at the inspection of the carriages was purely accidental. That he did not return with them into their Court, but went to the Court of Common Pleas, where he was engaged in the business of the Petty Sessions for two hours. That, there being some cases at the Petty Sessions which required a second alderman, he went into the Court of Quarter Sessions to see if an alderman could be spared to assist him, and with no other object: that, when he entered the Court, the appeal was being heard, and, "finding Mr. Alderman *Finnis* sitting at the nearest end of the bench, he spoke to him respecting the Petty Sessions business, and, whilst so speaking, sat next to the said Alderman *Finnis*: that he remained there for a few minutes only, and that, during the whole of the time he was in the said Court, he did not speak at all to the Recorder or to either of the aldermen except the said Alderman *Finnis*, and that the few sentences he addressed to him related entirely and exclusively to the business of the Petty Sessions on account of which he had entered the said Court, and that not a word was said by either himself or Mr. Alderman *Finnis* touching the said appeal or in any manner relating to the subject matter thereof." That, after quitting the Court of Quarter Sessions, he did not return thither on that day, but had left town before the appeal was concluded. There were additional affidavits by the Recorder, Alderman *Finnis*, and other persons, confirmatory of these statements, and adding that no objection was taken to Alderman *Wilson's* presence in Court by the appellant or his solicitor or counsel. Mr. *Pearson* stated that he supported the conviction in the discharge of his ordinary duty as solicitor to the Corporation of London, and would have charged the costs to the Court of aldermen if the appeal had been successful and costs awarded; and that Alderman *Wilson* would not have been liable to any expenses in that event.

Queen's Bench.
1852.

The QUEEN
v.
Justices of
LONDON.

Volume XVIII. Sir F. Kelly, Solicitor General, Clarkson and Bodkin, now shewed cause, 1852.

The QUEEN
v.
Justices of
LONDON,

Sir F. Kelly, Solicitor General, Clarkson and Bodkin, now shewed cause, and contended that, even assuming Alderman Wilson to have been an interested party, which he was not, the case was distinguishable, on the facts deposed to, from *Regina v. The Cheltenham Commissioners* (1 Q. B. 467), *Regina v. The Justices of Hertfordshire* (6 Q. B. 753) and *Regina v. Justices of Suffolk* (suprà).

Byles Serjt., Bliss and Pulling, contrà, relied upon *Regina v. Justices of Suffolk* (suprà), and cited *Dobson v. Groves* (6 Q. B. 637).

Lord CAMPBELL C. J. The ground of this application is, substantially, that the proceeding at Quarter Sessions was *coram non judice*, which it would have been if an interested party had been proved to have formed part of the Court. During this term we have expressed our anxiety that the greatest respect should be paid to the maxim which forbids any man to be judge in his own cause. There is no doubt that a person who is interested in the cause ought not to appear on the bench as a judge. My predecessor Holt, in a case in which he was interested while Chief Justice (as to the appointment of a Chief Clerk), appeared, not on the Bench but at the bar, instructing counsel. The charge here, on the affidavits in support of the rule, is that Alderman Wilson formed part of the Court which dismissed Macnamara's appeal. But I think the affidavits in answer are satisfactory. It appears that Alderman Wilson had no intention of being present to hear the appeal, but had made an arrangement inconsistent with his doing so, namely to sit at the Petty Sessions; and he was doing so when the appeal was called on. As to his entering the omnibus: he saw it casually, and said to Macnamara "I suppose you would not like me to get in;" and, upon Macnamara's answering that he would, he entered the carriage. That does not meet my entire approbation; but it is no sufficient ground for the objection taken on the other side. As to his presence afterwards in the Court of Quarter Sessions, he entirely clears himself. He says that he went there merely to seek the assistance of another magistrate; he talked to no one but Alderman Finnis, and that only upon the matter which occasioned his coming to the Court: and in these statements he is confirmed by other testimony. There is no ground for saying that he took any part in the hearing of the appeal. I do not approve of what took place in the omnibus; Mr. Wilson should not have asked to go in, nor done anything there in the absence of Macnamara. It does not appear that he did anything to influence the decision; but he was guilty of an indiscretion; and I therefore think this rule should be discharged without costs.

WIGHTMAN J. I agree that, if Alderman Wilson had taken a part in this decision, the present motion would have been well founded. But it

appears that he took no part either in the proceedings or in the determination. There was indeed an indiscretion in his conduct; but, it appears by his statement, not such as would influence the decision of the other magistrates. The application therefore fails.

ERLE and CROMPTON Js. concurred.

Queen's Bench.
1852.

The QUEEN
v.
Justices of
LONDON.

Rule discharged, without costs.

(The anecdote of *Holt C. J.*, above referred to, is related in Lord Campbell's *Lives of the Chief Justices of England*, vol. 2, p. 176, citing *Show. Parl. Cu. 111*, and *Skinn. 354*. The cause, *Bridgman v. Holt*, was tried at bar, before the three puisne Judges and a jury.)

LOWNDES *against* The Earl of STAMFORD and
WARRINGTON.

Friday,
April 30th.

COVENANT. Action commenced, 7th *August 1850*. The first count stated that heretofore &c., to wit on 2d *January 1849*, by indenture between defendant of the one part and plaintiff of the other part (profert), defendant appointed plaintiff to be auditor and superintending manager of all defendant's estates, including all or any estates thereafter to be by him acquired (other than his estates in the counties of *Leicester* and *Nottingham*), such appointment being considered as taking

The salary of an auditor and superintending manager of an estate, holding office during the joint lives of the employer and himself, is not a payment apportionable under stat. 4 & 5 IV. 4. c. 22. s. 2.

The indenture by which L., the auditor,

engaged himself stipulated that *L.*, who was a barrister, should relinquish so much of his practice as was incompatible with the office, and the whole if required by *S.*, the employer: that, if *S.* should revoke the appointment without adequate cause, the adequacy to be determined as after mentioned, or if *L.* should resign upon adequate cause, the adequacy to be determined in like manner, *S.* should allow *L.* a retiring pension of 1000*l.* a year during their joint lives: and that the adequacy of the cause for any revocation or resignation should be determined by a referee, who was named; with a proviso for other reference in case of necessity. Held:

That the stipulation for reference was not void as ousting the Courts of jurisdiction. But

That *L.*, being dismissed, as he alleged, wrongfully, might sue for the retiring pension without having first procured the adequacy of the cause to be decided upon by the referee; the sense of the agreement being that the onus of proving the adequacy of the cause to be adjudicated upon should lie upon that party who did an act (whether revocation or resignation) determining the employment.

Volume XVIII. effect from 7th *January* 1848, from which time the
1852. duties of the said offices of auditor and superintending
manager had been performed by the plaintiff; and plaintiff did thereby accept the said offices of auditor &c. And defendant did by the same indenture covenant with plaintiff that he, defendant, would, so long as plaintiff should hold the said offices, pay to plaintiff the annual salary of 1800*l.* by equal half yearly payments on 7th *July* and 7th *January*: and, further, that, in case the defendant should revoke the said appointment thereby made without adequate and just cause, then and in such case, from and after such revocation, defendant would, during the remainder of the joint lives of himself and plaintiff, pay to plaintiff a clear annual sum of 1000*l.* by equal half-yearly payments on the said half-yearly days therein and hereinbefore mentioned, the first of such payments to be made on such of the said half-yearly days as should first happen after such revocation. As by the same indenture &c. will more fully appear. Averment that, although from the time of the making of the said indenture hitherto plaintiff hath duly performed and fulfilled all things therein on his part to be performed &c., and hath, to wit during all the time last aforesaid, continued to hold the said offices of auditor and superintending manager to which he was so thereby appointed &c.: and although, after the making of the said indenture, and before the commencement of this suit, viz. on 7th *July* 1850, a large sum of money, viz. 900*l.* for the period of time between 7th *January* 1850 and 7th *July* 1850, during which the plaintiff held the said offices of auditor and superintending manager, became and was, under and by virtue of the said covenant in that behalf in the

LOWNDES
v.
Earl of
STAMFORD.

said indenture contained, due from and payable by the defendant to the plaintiff: yet the defendant hath not paid the sum or any part thereof.

*Queen's Bench.
1852.*

LOWNDES
v.
Earl of
STAMFORD.

The second count stated that, on 2d *January* 1849, the indenture in the first count mentioned (profert) was made &c. as in that count mentioned; and that, although, from the time of the making thereof hitherto, plaintiff hath always duly performed and fulfilled all things &c., and although plaintiff from the time of the making thereof continued to hold the said offices of auditor &c. until and upon a certain day which elapsed between 7th *January* and 7th *July* 1850 and before the commencement of this suit, viz. 27th *May* 1850, on which day defendant, without adequate and just cause in that behalf, revoked the said appointment of plaintiff so made by the said indenture as aforesaid: and although, after such revocation and before the commencement of this suit, viz. on 7th *July* 1850, the same day being such one of the said half-yearly days of payment as, according to the tenor and effect, true intent and meaning, of the said indenture, first happened after such last mentioned revocation, a large sum of money, viz. 500*l.*, being the first payment of the said clear annual sum of 1000*l.*, became and was due from defendant to plaintiff under and by virtue of the said covenant in that behalf &c., and although defendant has, from the time of the said revocation hitherto, ceased to pay, and has not paid, to plaintiff the said salary of 1800*l.* or any part thereof, and although defendant has not either before or since the said revocation, or at any time hitherto, obtained, nor has there been, any determination by the said Lieut. Col. *John Wildman*, or any other referees or umpire, that defendant had, or that there was, adequate and

Volume XVIII. just cause of or for such revocation by defendant as 1852.

LOWNDES
v.
Earl of
STAMFORD.

aforesaid, and although a reasonable time for the obtaining such determination elapsed long before the said 7th July 1850, yet no part &c.: breach, non-payment of the sum claimed by this count.

The deed was set forth on oyer. The plaintiff thereby accepted the "offices of auditor and superintending manager," and covenanted that he "shall not, during so long as he shall hold the offices to which he is hereby appointed, without the previous consent of the said Earl accept any other office or employment whatsoever, other than such other offices as he now holds with the privity and consent of the said Earl under the Earl *Granville* and his family, or may hereafter hold under the person or persons who may succeed to the estates and possessions of the said last named Earl, not exceeding in extent or requiring more time or pains for the performance of them than the offices which he now holds with such privity and consent as aforesaid; and shall relinquish and give up his practice as a barrister so far as such practice may be incompatible with or in any manner interfere with the efficient and perfect discharge of the duties of the offices to which he is hereby appointed; and shall, if so required by the said Earl," "totally relinquish and give up his practice." There was also a covenant by the Earl, that, in case the said *W. L. L.* "shall cease to perform the duties of the offices to which he is hereby appointed, by reason of his becoming incapable of performing such duties from permanent illness or infirmity, or in case the said Earl shall revoke the appointment hereby made, without adequate and just cause, the adequacy and justice of such cause to be determined as hereinafter

mentioned, or in case the said *W. L. L.* shall resign the offices to which he is hereby appointed upon adequate and just cause, the adequacy and justice of such cause to be determined as hereinafter mentioned, then and in any such case, from and after such becoming incapable, revocation or resignation, as the case may be, the said Earl shall, during the remainder of the joint lives of the said Earl and *W. L. L.*, pay to the said *W. L. L.* and his assigns a clear annual sum of 1000*l.* by equal half-yearly payments on the half-yearly days hereinbefore mentioned; the first of such payments to be made on such of the half-yearly days as shall first happen after such becoming incapable, revocation or resignation. That the adequacy and justice of the cause of any revocation by the said Earl of the appointment hereby made by him, and the justice and adequacy of the cause for the resignation of the said *W. L. L.* of the offices to which he is hereby appointed, shall be determined by *John Wildman*, of *Brook Street, Grosvenor Square*, Esquire, a Lieutenant Colonel in her Majesty's army, if living and able and willing to determine the matter in question." There was a proviso for further reference, and umpirage, in case of necessity.

The defendant pleaded, to the first count: "That, heretofore, and before the 7th day of *July*, A.D. 1850, viz. on the 27th day of *May*, A.D. 1850, he the defendant revoked the said appointment of the plaintiff in the said first count mentioned; and he the plaintiff thereupon and thereby then ceased to hold, and hath thence hitherto ceased to hold, the said offices to which he was so appointed as in the said first count mentioned: Without this, that the plaintiff held the said offices of auditor and superintending manager, to which he was so

Queen's Bench
1852.

LOWNDES
v.
Earl of
STAMFORD.

Volume XVIII. appointed as aforesaid, during the whole period of time
1852. between the 7th day of *January A.D. 1850* and the said

LOWNDES
v.
Earl of
STAMFORD. 7th day of *July A.D. 1850*, in manner and form" &c.
Conclusion to the country.

To the second count the defendant demurred, assigning for causes, among others: For that the plaintiff ought to have shewn in proof and support of his title to the annuity of 1000*l.* that he had obtained, or that there had been, a determination, in the mode prescribed by the indenture, as to the adequacy and justice of the cause of revocation, and that it had been thereby determined that the revocation was without adequate and just cause: and for that, although it is alleged in the 2d count that defendant hath not obtained any determination in the prescribed mode as to the adequacy and justice of the cause of revocation, it does not appear that a determination has not been obtained by the plaintiff; and that it does not appear that plaintiff was ready and willing to concur with defendant in obtaining a determination in the prescribed mode; nor does it appear whether or not Colonel *Wildman* is living, and able and willing to determine the matter, or how, under the actual circumstances, the same might and ought to have been determined: and, although it is alleged that a reasonable time for obtaining such determination elapsed long before 7th *July 1850*, it does not appear whether such allegation refers to the plaintiff or defendant obtaining such determination. The plaintiff joined in demurrer.

The plaintiff demurred to the plea to the first count, assigning for causes, among others: That the inducement answers only a part of the alleged cause of action, though the traverse professes to answer the whole;

that the traverse is taken upon matter not alleged nor necessarily implied by the count; that the revocation does not appear to have been such as would disentitle the plaintiff to damages; &c. Joinder.

Queen's Bench.
1852.
LOWNDES
v.
Earl of
STAMFORD.

The demurrers were now argued (a).

Sir F. Thesiger, for the plaintiff. First: The plea to the first count is insufficient. The count claims the entire half-year's salary from *January 7th* to *July 7th*. The traverse denies that the plaintiff held his offices during that entire period: but this is no answer, at any rate to the whole of the demand; for, in whatever way the plaintiff's holding of office was determined during the half-year, he was entitled to an apportionment of salary, under stat. 4 & 5 W. 4. c. 22. s. 2. (b). [Lord

(a) Before Lord Campbell C. J., Wightman and Erle Js. Crompton J. took no part in the decision, having been counsel in the cause.

(b) Stat. 4 & 5 W. 4. c. 22. s. 2. enacts: That all rents service &c., "and all rents charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom of *Great Britain* and *Ireland*, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this Act;" "shall be apportioned so and in such manner that on the death of any person interested in any such rents" &c. "or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents," &c. "and other payments according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be) including the day of the death of such person, or of the determination of his or her interest;" "and that every such person, his or her executors," &c., "shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents," &c., "and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, as he, she or they would have had for recovering and obtaining such entire rents," &c., "and other payments if entitled

Volume XVIII. *Campbell* C. J. Would the language of that clause be applicable in the case of a servant discharged for good cause?]

1852.

*LOWNDES v.
Earl of STAMFORD.* Apparently it would, in a case within the terms of the Act. But, without resorting to the statute, the plaintiff here must recover his whole demand, because the defendant states that he revoked the appointment during the half-year, but does not allege that he did so for just and adequate cause.

Secondly, the second count is good. An agreement that all disputes shall be referred to arbitration cannot oust the jurisdiction of a Court of law or equity. This was said by Lord *Kenyon*, in *Thompson v. Charnock* (*a*), to have been "decided again and again." *Kill v. Hollister* (*b*), there cited, exemplifies the rule. *Best* C. J. acted upon that decision in *Goldstone v. Osborn* (*c*). The rule is the same whether the arbitration clause applies to the whole or part only of the deed. [Lord *Campbell* C. J. If a perfect cause of action has accrued, the Courts cannot be ousted of jurisdiction to enforce it; but the parties might perhaps agree that the existence of a cause of dismissal should be ascertained by reference.] Nothing on this record shews that a cause of action has not attached. If the jurisdiction could be ousted here, the plaintiff might be without remedy; for a Court of equity will not order specific performance of an agreement to

thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who if this Act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this Act in any action or suit at law or in equity."

(*a*) 8 T. R. 139.

(*b*) 1 Wils. 129.

(*c*) 2 Car. & P. 550.

refer; *Gourlay v. The Duke of Somerset* (*a*), per Sir *Queen's Bench.*
W. Grant M. R. But, assuming that the agreement *1852.*
for reference was binding, the question is, whose duty
it was to take the steps for ascertaining the sufficiency
or insufficiency of the supposed cause of revocation?
According to the deed as set out on oyer, it lay upon
the defendant, if he took the step of revoking the
plaintiff's appointment, to shew that he had done so on
proper grounds. [Lord *Campbell C. J.* You say that he
had only a conditional power of revoking. *Wightman J.*
That, if the plaintiff resigned, he was to take the steps
for establishing that he had done so on proper grounds;
and, if the defendant dismissed, he was to proceed in the
like manner: that whoever did the act determining the
relation was to take the initiative in a proceeding to
arbitration.] That is the effect of the covenant. The
employment was intended to be permanent; he who
put an end to it was, *prima facie*, a wrong doer. There
is, virtually, an appointment during good behaviour: in
the absence of any arbitration clause, Lord *Stamford*, if
he dismissed the plaintiff, would have been bound to
shew a cause of dismissal; and it makes no difference
that the parties here have provided a mode of ascertaining
such cause. The defendant does not plead that there
was such cause, but demurs; thereby assuming that the
plaintiff is to lie under the onus of negativing every
ground of dismissal that could have arisen. But the
grounds, if any, were in the defendant's knowledge; and
it is reasonable that he should be required to shew them.

LOWNDES
v.
Earl of
STAMFORD.

J. A. Russell, contrà. As to the plea. The plaintiff,

Volume XVIII. in his first count, sues as having held the office during 1852. — LOWNDES v. Earl of STAMFORD. the entire half-year: if that is a material fact, the traverse of it is good. If the count had been upon a quantum meruit for the time during which he actually served, as in *Osborne v. Rogers* (*a*), the traverse would, according to that case, have been bad: but the plaintiff relies upon a covenant to pay an annual salary on certain days: and, if the service was determined before one of the days arrived, he cannot have the salary apportioned, unless under stat. 4 & 5 W. 4. c. 22. *Countess of Plymouth v. Throgmorton* (*b*) shews that, at common law, it could not be done. (Sir F. *Thesiger* admitted that there could be no apportionment here but under the statute.) [Lord *Campbell* C. J. The preamble of the statute, sect. 1, if we may take the law from it, decides that.] Then, the statute clearly does not apply to this claim. It stands upon the same footing as a demand for wages, which no one has ever claimed to apportion instead of suing on a quantum meruit. The words "and all other payments," following the words "rents charge and other rents, annuities," &c., must refer to payments *ejusdem generis*. [Lord *Campbell* C. J. Such payments, you would say, as will still be made to some one, though the payment to a particular individual has ceased.] "Determination" "of the interest of any such person" cannot apply to interest in the receipt of a salary. [Lord *Campbell* C. J. Is there any applicable case on the statute?] None has been found.

The second count is bad. No perfect cause of action upon this agreement could exist till the adequacy or inadequacy of the cause of dismissal had been ascer-

(*a*) 1 *Saund.* 267.

(*b*) 1 *Salk.* 65.

Queen's Bench.
1852.

LOWNDES
v.
Earl of
STAMFORD.

tained. The words "in case the said Earl shall revoke" &c. "without adequate and just cause" are qualified by those which follow; "the adequacy and justice of such cause to be determined as hereinafter mentioned." The qualifying words are an inseparable context. No cause could be adequate or inadequate except as might be determined by arbitration. The cases extant do not assist much towards deciding this; but *Thurnell v. Balbirnie* (*a*) bears some analogy to it, and is in the defendant's favour. In *Worsley v. Wood* (*b*) an insurance company undertook to indemnify the assured "according to the tenor of the printed proposals delivered with the policy." By one of the proposals it was required that the person claiming indemnity should procure a certificate under the hands of certain persons as to his character and the bona fides of his claim. The Court held that the words "according" &c. introduced an essential qualification of the contract to indemnify, and that the assured was not in a situation to demand the indemnity until he procured the certificate, though, as he alleged, the parties who should have signed it wrongfully refused to do so. The determination of Col. *Wildman* is a condition precedent here, as the certificate was in that case. [Lord *Campbell* C. J. When was the adequacy of the cause to be ascertained here?] The ascertaining of it is a condition precedent to the recovery of compensation. [Lord *Campbell* C. J. May there be a dismissal before the sufficiency of the cause is ascertained? Is the dismissing party to punish first and hear afterwards?] The plaintiff's liberty to resign is upon the same terms. [*Wightman* J. The

Volume XVIII. power to revoke, as the words of the indenture imply, is upon "adequate and just cause, the adequacy and justice of such cause to be determined as hereinafter mentioned."] Suppose judgment were given for the plaintiff in this case: it might turn out on subsequent inquiry that there was just cause for dismissal; yet, if the plaintiff's argument prevail, a right to the half-yearly retiring allowance will have accrued to him in the meantime. [*Erle* J. The covenant seems to be that the right shall vest if the one party dismisses without Col. *Wildman*'s approval, or if the other resigns without Col. *Wildman*'s approval; that the party claiming to determine the agreement must shew a decision by Col. *Wildman*.] The retiring salary is to be payable "from and after such" "revocation or resignation;" that is revocation or resignation without such cause as Col. *Wildman* should pronounce adequate. If, indeed, the words had been, that the retiring salary should be payable from and after revocation or resignation, provided that, unless the adequacy or inadequacy of the cause were determined as before mentioned, the benefit should not accrue, it would have been necessary to plead such a proviso as qualifying the covenant for payment; *Clayton v. Kynaston* (*a*); in which case *Holt* C. J. says, "that where the proviso goes by way of defeasance, it must be pleaded by him that takes advantage of it;" but, as he lays down immediately afterwards, where it "alters the sense of the covenant, by explaining and tying up the" thing stipulated for "to a particular time, which would not have been understood on the general covenant, by which means it becomes a part of the covenant," the party relying on the covenant

(*a*) 2 *Salk.* 573.

LOWNDES
v.
Earl of
STAMFORD.

"must plead accordingly." The latter part of the dictum applies to this case. The plaintiff is not, as was suggested on the other side, put under the difficulty of proving a negative: he might have alleged, and shewn, affirmatively, a finding by Col. *Wildman* that the dismissal was without just cause.

Queen's Bench.
1852.

LOWNDES
v.
Earl of
STAMFORD.

Sir *F. Thesiger*, in reply. As to the first point, the consequence of the argument for the defendant is that, even if the plaintiff had died, the case would have been beyond the reach of the Act. But the words of sect. 2 are quite general: "all rents charge" &c. "and all other payments of every description." This cannot mean merely payments *ejusdem generis*. [*Erle* J. The enumeration seems limited at any rate to payments "derived" from an "estate, fund, office, or benefice." The question may be whether the employment of auditor or manager, though called an office in the indenture, is such an office as the Act contemplates. Lord *Campbell* C. J. Suppose a person holding an employment of this kind served three months and then absconded]. It is not necessary to contend that there might not be such misconduct as would disentitle to the salary: but that is not the present case. As to the second point, the question, what is a condition precedent, depends on the terms of each particular instrument. Here the plaintiff, on the one hand, was stipulating to give up his profession: the defendant, on the other, was entering into a contract which made it important that he should not be at the mercy of the plaintiff if he were disposed suddenly to depart from his engagement. Both evidently intend to use such language as will afford the most direct safeguard. Hardship may arise equally

Volume XVIII. on either side from a close observance of the terms.
 1852. *Thurnell v. Balbirnie* (*a*) does not resemble this case.

LOWNDES
 v.
 Earl of
 STAMFORD.

There the agreement was to purchase at a valuation to be made by valuers on each side: the defendant and his valuer would not proceed; and the plaintiff had the goods valued, and sued for the price. The count, shewing these facts, was held insufficient; but there could have been no contract to take and pay for the goods without such a valuation as had been agreed upon: and the judgment turned in a great measure upon the want of explicit allegations in the count. *Worsley v. Wood* (*b*) is not applicable. [Lord Campbell C. J. It is a totally different case]. There the covenantee had stipulated for certain things to be done on his part, which were not done: here the covenantor has done an act alleged to be contrary to his covenant, which it lies on him to justify.

Cur. adv. vult.

Lord CAMPBELL C. J., in the same term (*May* 6th), delivered the judgment of the Court.

We think that on the demurrer to the plea to the first count there ought to be judgment for the defendant.

The plea, averring that the defendant had revoked the appointment of the plaintiff before the 7th day of *July* 1850, when the half-year's salary sued for is alleged to have become due, concludes with a special traverse of the allegation that the plaintiff held the office of auditor during the whole half-year down to the said 7th day of *July*.

The plaintiff's counsel, admitting that he can only

seek to recover a portion of this half-year's salary, and that at common law it could not be apportioned, rests this claim entirely on stat. 4 & 5 W. 4. c. 22. s. 2. The language here employed by the Legislature is very general; but we do not think that it was meant to apply to a payment like this, under a contract between employer and employed, for services performed, where the payment entirely ceases upon the determination of the claimant's right to receive it. The statute makes the enumeration of "the estate, fund, *office*, or benefice from or in respect of which" the rents or other payments "shall be issuing or derived;" and the deed contains the expression of "offices of auditor and superintending manager" to which the plaintiff was appointed: but, looking to the context, it appears to us that these are not offices within the meaning of the enactment, not being of a public nature, and no rents nor payments issuing or being derived from or in respect of them. The dismissal from an employment created by contract can hardly be called the determination of the *interest* of the person employed. The time fixed by the statute, when the apportionment is made recoverable, is "when the entire portion of which such apportioned parts shall form part shall become due and payable." This contemplates a case where the party who has to pay will have to pay for the whole period to some one, and not a case where the payment entirely ceases with the determination of the interest of the person receiving the apportionment, and where the entire portion of which this forms a part never does become due or payable. We are therefore of opinion that the half-yearly payment in question remains unapportionable, as at common law.

Queen's Bench.
1852.

LOWNDES
v.
Earl of
STAMFORD.

Volume XVIII.
1852.

LOWNDES
v.
Earl of
STAMFORD.

On the demurrer to the second count of the declaration our judgment will be for the plaintiff. The allegations in this count appear to us sufficient to shew that, after the revocation, he was entitled to the sum of 1000*l.* a year, payable half-yearly. We think that the deed makes no attempt to oust Courts of their jurisdiction; and that the numerous cases cited on this subject are wholly inapplicable. We have to peruse the deed executed by these parties, and to see what was the real contract between them. If the defendant had power to dismiss the plaintiff upon the statement that he had adequate and just cause, throwing upon the plaintiff, after the dismissal, the burden of appealing to Colonel *Wildman*, the second count of the declaration would be bad: but we think that the defendant had no power of dismissal without giving a right to the allowance of 1000*l.* a year, till he had previously ascertained by the judgment of Colonel *Wildman* or of the two referees, one named by each party, or of one referee named by himself, that he had adequate and just cause to revoke the appointment. The obtaining of this judgment was a condition precedent to the reserved power of revocation; and the payment of 1000*l.* a year was to become due if there was a revocation without adequate and just cause, so previously ascertained. It appears by the deed that the plaintiff was a practising barrister who, in consideration of this lucrative appointment, covenanted to give up practice as far as was inconsistent with the duties he undertook as auditor, and to give up practice altogether at the request of the defendant. It was of great importance to him that he should not be capriciously dismissed from his auditorship. Again, the defendant placed the plaintiff in a situation of great

confidence ; and very inconvenient consequences might follow to the defendant if the plaintiff, from caprice, or from wishing to enter into some still more profitable employment, should, without adequate and just cause, resign the auditorship. Both parties had entire confidence in Colonel *Wildman*; and the agreement between them was that, till his judgment had been obtained that there was adequate and just cause for removal or resignation, the one party should not be at liberty to remove nor the other to resign ; the defendant covenanting that, if he removed without such judgment, he should pay the plaintiff 1000*l.* a year during their joint lives. If such was the agreement, the demurrer to the second count cannot hold ; for the plaintiff was not bound to shew that he had obtained, or that there was, any determination in the mode prescribed as to the adequacy or justice of the revocation, or that it had been determined that the revocation was without adequate or just cause ; nor was it necessary to aver that a reasonable time had elapsed for the defendant or for the plaintiff to have obtained such determination, or to allege any excuse for the plaintiff not having obtained it. The revocation having taken place without the previous determination, in the prescribed form, of the existence of adequate and just cause, the annuity of 1000*l.* became payable, and the arrear claimed is recoverable.

The decision of the Court of Exchequer in *Thurnell v. Balbirnie* (a) was on a contract of a totally different nature, the defendant having agreed to purchase goods from the plaintiff, the price of which was to be fixed by two individuals named ; and it was very properly held

Queen's Bench.
1852.

LOWNDES
v.
Earl of
STAMFORD.

Volume XVIII. that the defendant could not be liable for the price of the goods until they had been valued by both valuers, pursuant to the agreement; at least without an averment that the defendant prevented the valuation. *Worsley v. Wood* (*a*) proves that, if there be a condition precedent, to be performed by the plaintiff before he has a right of action, his declaration must aver the performance of the condition. Very sound doctrine is likewise to be found in *Clayton v. Kynaston* (*b*) respecting a proviso which goes by way of defeasance of a covenant; but it has no tendency to shew that, upon the construction of this deed, if the defendant revoked the appointment without adequate and just cause previously determined in the manner prescribed, he would not be liable for the payment sought to be recovered. On the second count, therefore, our judgment is for the plaintiff.

Judgment for defendant on the demurrer to the plea to the 1st count. For plaintiff on the demurrer to the 2d count (*c*).

(*a*) 6 T. R. 710.

(*b*) 2 Salk. 574.

(*c*) A writ of error was afterwards brought by the defendant in the Exchequer Chamber. Upon the argument, that Court intimated a strong opinion that the first count was not maintainable; but they suggested that the question, whether the defendant had adequate and just cause for dismissing the plaintiff, must eventually, in some form, be made the subject of a reference, and that it had better be referred at once, without carrying the proceedings in the action any farther. Accordingly, that question was referred to the Recorder of London (the Right Hon. J. A. S. Wortley): it being arranged that the arrears and future payments of the annuity should depend upon the event of his decision. The Recorder afterwards made an award in the plaintiff's favour.

LOWNES
v.
Earl of
STAMFORD.

Queen's Bench.
1852.

HESELTINE *against* SIELY.

Friday,
April 30th.

DEBT. 1st count, by plaintiff as payee, against defendant as maker, of a promissory note. 2d count, on an account stated.

Plea 2. That the account was stated of and concerning the cause of action in the first count mentioned: That, before the making of the note, defendant was indebted to *Richard Clark* in 42*l.* and to plaintiff in 48*l. 6s.*, and to other persons in divers other sums, and, being a prisoner in actual custody &c. upon process at the suit of *Clark* for the said debt due to him, did, according to "the statute made and passed in the second year of the reign of her present Majesty" (a), file his petition in the Insolvent Debtors' Court for his discharge &c.; and his estate was afterwards, by order under the Act, vested in the provisional assignee, and defendant delivered, subscribed and filed a schedule &c., in which was a full and true description of his said debt to the plaintiff, and the said Court appointed a day for defendant to be brought before it, to be dealt with according to the statute: Of all which premises in this plea aforesaid the plaintiff had notice, and then protested and declared and threatened

To an action by payee against maker of a promissory note, the defendant pleaded that before the time of the making he was indebted to plaintiff and others, and filed his petition in the Insolvent Debtors' Court, and delivered a schedule, including his debt to the plaintiff, and a day was appointed for his examination. That plaintiff threatened to oppose his discharge unless defendant would give him promissory notes to the amount of his debt: and thereupon defendant, to induce plaintiff to abandon his opposition, made and

delivered to him promissory notes, one of which was that now declared upon. And that defendant afterwards, by order of the said Court, was discharged, according to stat. 1 & 2 Vict. c. 110., from the said debt in respect of which the last mentioned note was given; which discharge remains in full force.

Sembly, by *Wightman, Erle and Crompton Js.*, and Held by *Lord Campbell C. J.*, that the plea was double, and bad on demurrer. Leave to amend granted.

(a) 1 & 2 Vict. c. 110. It was assigned as a cause of demurrer, and mentioned in the argument, that this notice of the Act, not referring to it with certainty by its title or other distinctive mark, was insufficient.

Volume XVIII. ened the defendant that he the plaintiff would oppose
 1852. his discharge unless defendant would make and deliver
HESELTINE to plaintiff certain promissory notes for divers sums of
 v.
SIELY. money exceeding the amount of the said debt so due
 from defendant to plaintiff as aforesaid; and thereupon,
 to wit on &c., in order to induce plaintiff to abandon
 his said threat and not to oppose the discharge of
 him the defendant, he the defendant did then make
 and deliver to plaintiff the said promissory notes, one
 whereof is the said promissory note in the said first
 count mentioned. And defendant further saith that
 he the defendant afterwards, and after the making and
 delivery of the said promissory notes as aforesaid, to wit
 on &c., by a certain order made by the said Court for
 the relief of insolvent debtors in *England* held at the
 Court House, *Portugal Street* &c. (he the defendant then
 being a prisoner in custody as aforesaid), was duly dis-
 charged according to the said statute of and from the
 said debt so due to the plaintiff as aforesaid, and in
 respect whereof he the defendant had made and de-
 livered the said promissory notes; and the defendant
 avers that the said discharge still remains in full force
 and effect. Verification.

Demurrer, on the grounds of duplicity and repugnancy,
 and for other causes. Joinder.

Henry James, for the plaintiff. The plea sets up two
 complete defences; one, the invalidity of the contract,
 according to *Hall v. Dyson* (*a*); the other, that defendant
 was discharged by the Insolvent Debtors' Court from the
 debt in respect of which the promissory note was given:

the consequence of which would be that the note itself, at least if it remained in the payee's hands (and the plea does not shew the contrary), is discharged also : *Reeves v. Lambert* (a). [Erle J. The facts of that case were very different from those pleaded here. Wightman J. Suppose the note, here, had been given after the discharge.] It is not necessary to say whether in that case the note would have been avoided; here it was given before the discharge. [Erle J. If the note was given, not in satisfaction of the debt, but as a collateral security, do you say that the security is gone by reason of the discharge, notwithstanding the intention of the parties?] The plaintiff contends only that two defences are set up, each of which might be an answer. It is not pleaded that the note was given as a collateral security. If the plea had stated that, the plaintiff might have replied *De injuriā*; as it is, no one replication can answer it. The plea is bad also as setting up two distinct considerations for giving this note; the debt itself, and the plaintiff's forbearing to oppose; and not shewing which is relied upon.

Queen's Bench.
1852.

*HESELTINE
v.
SIELY.*

The Court then called upon

Ball, for the defendant. This is the form of plea universally adopted since the New Rules. In 3 *Chitty on Pleading*, 40, 7th ed., there is a precedent in which both the unlawful agreement and the discharge are stated. In *Warner v. Haines* (b) there was a plea containing both averments; and this is referred to in *Chitty Junr.'s*

(a) 4 *B. & C.* 214. See *Beck v. Beverly*, 11 *M. & W.* 845.

(b) 6 *Car. & P.* 666.

Volume XVIII. Precedents, 334 (2d ed., by Pearson). [Crompton J. 1852.]

HESKETTINE

v.
SIELY.

When you say that the discharge remains in full force and effect, it looks very much like relying upon it as a defence. Lord *Campbell* C. J. If the plaintiff had replied *De Injuriâ*, how much of the plea do you say the defendant would have been bound to prove?] He would have been obliged to prove the discharge; but the defence is the illegality. [*Erle* J. You may perhaps contend that, if the plea had made no mention of the agreement not to oppose, but had merely stated that the note was given before the discharge, as collateral security for a debt inserted in the schedule, and then alleged the discharge, such a plea would not have been bad; and that the agreement is mere surplusage and does not vitiate the plea. *Crompton* J. Matter badly pleaded may render a plea double; whether the averments here do so may be a disputable point, according to *Regil v. Green* (a). Do you wish to settle it at your risk, if you can have leave to amend? I doubt if you are safe.] *Ball* mentioned *Harrison v. Cotgreave* (b). [*Wightman* J. Do you think you are safe? Lord *Campbell* C. J. The defendant, after setting up one defence, the original agreement, alleges his discharge, which is also a good defence: in my opinion that is clear duplicity.]

Per Curiam,

Leave granted to amend.

(a) 1 *M. & W.* 328.

(b) 4 *Com. B.* 562.

*Queen's Bench.
1852.*

The QUEEN against The Inhabitants of the
Township of HUSTHWAITE.

*Saturday,
May 1st.*

ON appeal against an order of two justices, dated 18th June 1850, for the removal of *Ursula Atkinson*, wife of *William Atkinson*, who had absconded to *America*, and her five children, from the parish of *Knayton with Brawith* to the parish of *Husthwaite*, both in *Yorkshire*, the Sessions confirmed the order, subject to the opinion of the Court upon the following case.

The settlement stated in the grounds of removal was that the pauper's husband, *William Atkinson*, had, at *Lady day* 1844, rented a house and farm in the appellant parish, at the rent of 70*l.* a year, for one whole year ending *Lady day* 1845, and paid the year's rent for the same; and that he was also assessed to the poor rate of the township of *Husthwaite*, and paid the same in respect of the said dwelling house and farm for one year during which he so occupied the same; and that, during the whole period of his occupation, he resided and slept in the township of *Husthwaite*.

There were three grounds of appeal, traversing the renting, occupation and payment of rates as stated in the grounds of removal. They were as follows.

"*Atkinson, Mr.*" appeared as the name of the occupier of the farm in two rates, and "*Atkinson, Thomas*" in a third.

Held, that the Sessions were justified in finding, First, that there was a sufficient occupation and payment of rent by *William*, and a sufficient assessment of him and payment of the rates by him, to give him a settlement in *H.* under stats. 1 *W.* 4. c. 18. and 4 & 5 *W.* 4. c. 76.; and, Secondly, that he had been sufficiently charged with, and paid his share of, the public taxes of *H.* to gain a settlement under stat. 3 & 4 *W. & M.* c. 11.

*Volume XVIII.
1852.*

*The Queen
v.*

*Inhabitants of
HUSTHWAITE.*

1. That the said *William Atkinson* did not acquire a settlement in the said township of *Husthwaite*, nor take and hire at *Candlemas*, in the year 1844, of Mr. *John Buckle*, from year to year, commencing on the 6th *April* 1844, at the rent or sum of 70*l.* a year, a tenement consisting of a separate and distinct dwelling house, farm house or building, and 25 acres and upwards of land, situate in the said township of *Husthwaite*, as in the grounds of removal which accompanied the said order is alleged.

2. That the said *William Atkinson* did not hold and occupy the said dwelling house and land under the said alleged hiring, in the said township, from the 6th *April* 1844 until the 6th *April* 1845; nor did he pay the said yearly rent for the said term of one year, as in the grounds of removal is alleged.

3. That the said *William Atkinson* was not assessed to the poor rates of the said township of *Husthwaite*, nor did he pay the same rates in respect of the said dwelling house and land for one year during which it is alleged he so occupied the same, in manner and form as in the said grounds of removal is alleged.

It was admitted by the attorneys for the respective parishes :

That, at or about the time in that behalf mentioned in the respondents' statement, the pauper's husband, *William Atkinson*, and his father, *Thomas Atkinson*, entered into an agreement with *John Buckle*, therein mentioned, the legal effect whereof was to give the said *William Atkinson* and *Thomas Atkinson* a joint tenancy from year to year in the tenement and at the rent in the respondents' statement respectively mentioned, commencing on 6th *April* 1844.

That the whole of the rent and the whole of the poor rates in respect of the said tenement, for the year ending 6th April 1845, were paid by *Thomas Atkinson*.

Queen's Bench.
1852.

At the trial of the appeal, after the above admissions had been put in, it was proved that the house and farm were in fact hired and rented by the pauper's husband and his father, *Thomas Atkinson*, as joint tenants. That the pauper's husband entered on the farm at *Lady day* 1844, and from that time resided there and managed the farm until *Lady day* 1845, the farming stock belonging to him; the father, *Thomas Atkinson*, continuing, during the whole of the time aforesaid, to reside upon another farm, in the township of *Balk*, about five miles from the appellant township, and never sleeping at the farm in the appellant township but for two nights during the tenancy; but that the whole of the rent of the said tenement in the appellant township was bona fide paid by the father, *Thomas Atkinson*, and that such tenement consisted of a separate and distinct dwelling house and land; and that the land of itself, independently of the said dwelling house, was of sufficient value, and the rent paid in respect thereof was of sufficient amount, to confer a settlement on both the said *William Atkinson* and the said *Thomas Atkinson*.

The QUEEN
v.
Inhabitants of
HUSTHWAITE.

In the rate books of the appellant township for the years 1844 and 1845, which were produced by the overseers, the house and farm in question were described as "buildings and lands," and "*Atkinson, Mr.*" appeared in the column headed "name of occupier," as the person rated in two rates, made on 18th April and 17th July 1844. In a third rate, made on 8th January 1845, "*Atkinson, Thomas,*" appeared under the column headed "name of occupier."

Volume XVIII.
1852.
**The Queen v.
Inhabitants of
HUSTHWAITE.**

It was admitted that the overseers of the appellant parish had always demanded and received payment of the rates in question from *Thomas Atkinson*, the father.

The appellants objected that there was no sufficient proof of renting a tenement, so as to confer a settlement on the pauper's husband within the meaning of stats. 1 *W. 4. c. 18. s. 1.* and 4 & 5 *W. 4. c. 76. s. 66.*, on the following grounds.

First: That, no rent having been actually paid by the hands of the pauper's husband, the Sessions could not infer that there was a sufficient payment of rent by him to satisfy that portion of the above statutes which requires the rent to be actually paid by the person hiring the tenement.

Second: That, as the statute requires the tenement to be either a separate and distinct dwelling house or building, or land, or both, a joint tenancy of the house and farm in question did not confer a settlement on *William Atkinson*.

Third: That, if there was a sufficient payment of rent by *William Atkinson*, there was no compliance with the requisites of stat. 4 & 5 *W. 4. c. 76. s. 66.*, the pauper's husband not having been assessed to, or having paid, the rates within the meaning of that section.

Fourth: That, in case there was no sufficient proof of a settlement by renting a tenement on the grounds above stated, there was no sufficient proof of the settlement by the payment of rates under stat. 3 & 4 *W. & M. c. 11. s. 6.*

The Sessions overruled the above objections, and found, upon the evidence as above stated:

First: That there was a sufficient payment of rent by

the son (the husband of the pauper) to confer a settlement upon him.

*Queen's Bench.
1852.*

Second : That a joint tenancy of the land in question conferred a settlement on the said *William Atkinson.*

*The QUEEN
v.
Inhabitants of
HUSTHWAITE.*

Third : That the payment of rates by *Thomas Atkinson*, the father, was, in point of law, a payment of rates by the son, so as to confer a settlement upon him.

Fourth : That the assessment and payment of rates above set forth was such an assessment and payment of rates by the said pauper's husband as (coupled with the renting of the tenement above mentioned) did confer a settlement upon him under stats. 1 *W. 4. c. 18. s. 1.* and 4 & 5 *W. 4. c. 76. s. 66.*

Fifth : That, in case the said assessment and payment of rates was not sufficient to enable the pauper's husband to obtain a settlement by renting a tenement under the last mentioned statutes, the Sessions found that it was such a charging with and payment of his share to the public taxes or levies of the parish of *Husthwaite* as would confer a settlement upon him therein under stat. 3 & 4 *W. & M. c. 11. s. 6.*

If the Court of Queen's Bench should be of opinion that there was no evidence of settlement, either by renting a tenement or by payment of rates, on the grounds above stated, the order of Sessions was to be quashed ; but, if the Court of Queen's Bench should be of a contrary opinion, then the order of Sessions to stand confirmed.

Rose and Lefroy, in support of the order of Sessions. First, the pauper's husband acquired a settlement, under stat. 3 & 4 *W. & M. c. 11. s. 6.*, by payment

Volume XVIII of rates. *Regina v. St. Mary Kalendar* (*a*) decides that a renter and occupier of a tenement within the meaning and provisions of stat. 6 G. 4. c. 57. & 2 may gain a settlement under stat. 3 & 4 W. & M. c. 11. & 6. by payment of the poor rate for even a part only of the year; and *Regina v. St. Lawrence in Appleby* (*b*) shews that, where, as in the present case, a dwelling house and land are let to two joint tenants, either of them is an occupier within the provisions of the former statute, in respect of his joint tenancy of the land, if the renting, as in the present case, is in other respects within the provisions of the Act. The payment of the rates by *Thomas Atkinson*, the father, must be considered as a payment on behalf of the son also, on the principle, adverted to by the Court in *Right dem. Fisher v. Cuthell* (*c*), that every act done by one of two joint tenants for the benefit of both is binding upon the other.

Next, the pauper's husband acquired a settlement, under stats. 1 W. 4. c. 18. s. 1. and 4 & 5 W. 4. c. 76. s. 66., by renting and occupying the tenement in question, the rent and poor rates in respect of it having been paid for one year. As regards the occupation, *Regina v. St. Lawrence in Appleby* (*b*) shews that the joint tenancy is sufficient. But it is objected, with respect both to this and the first mentioned ground of settlement, that the pauper's husband is not distinctly named in the rate books as the occupier; and that the rates, as well as the rent, were in fact paid by *Thomas Atkinson*, the father. But in *Rex v. Heckmondwicke* (*d*) it was held that, where the actual occupier was known to the parish, payment of rates by him was a sufficient pay-

(*a*) 9 A. & E. 626.

(*b*) 6 Q. B. 842.

(*c*) 5 East, 491. 498.

(*d*) 2 Doug. 564.

ment to give him a settlement, under stat. 3 & 4 *W. & M.* c. 11. s. 6., even though another name appeared in the rate books as that of the occupier. *Rex v. Painswick* (a), *Rex v. Walsall* (b) and *Regina v. St. Marylebone* (c) are to the same effect; and so is *Regina v. Hulme* (d) as regards an assessment under stat. 4 & 5 *W. 4.* c. 76. s. 66. And, as has been already stated, the payment by the father must be held to have been made on behalf of the pauper's husband, the other joint tenant and the actual occupier. *Rex v. Bridgewater* (e) shews that the payment need not have been actually made by the occupier himself. And, on the principle just relied upon, the payment of the rent by *Thomas Atkinson* must also be considered as a payment on behalf of both *William* and *Thomas*.

Queen's Bench.
1852.

The QUEEN
v.
Inhabitants of
HUSTHWAITE.

Bliss and *E. P. Price*, contrà. Under stat. 3 & 4 *W. & M.* c. 11. s. 6. the party "charged" is the party who must pay the rate; and, under stat. 4 & 5 *W. 4.* c. 76. s. 66., the party who is "assessed to the poor rate" must "have paid the same" for one year, in order to gain a settlement. Now here the pauper's husband had neither been charged with or assessed to, nor has he paid, the rates. The Sessions have not found that there was an actual assessment of, or payment by, him; but only that, upon the evidence before them, there was what amounted to a constructive payment by him. They do not find that the words "*Atkinson, Mr.*" in the rate books, meant *William Atkinson*; and the facts

(a) *Burr. S. C.* 465.

(b) *Cald. 35.*

(c) 15 *Q. B.* 399.

(d) 4 *Q. B.* 538.

(e) 3 *T. R.* 550. See *Rex v. South Kilvington*, 5 *Q. B.* 216.; *Regina v. Benjeworth*, 3 *E. & B.* 637.

Volume XVIII. stated in the case tend strongly to shew that *Thomas Atkinson*, the father, was meant. The cases which have been cited of misdescription or nondescription in the rate books were cases in which the description might possibly apply to the pauper, and could not apply to any one else. That is not so here; nor can it be contended that the payment by *Thomas Atkinson*, the father, was payment on behalf of, and therefore, practically, payment by, the son. There is no evidence of that; nor is there anything to shew that *Thomas Atkinson*, who was himself an occupier, did not pay the rates as such. [Lord Campbell C. J. On behalf of himself and the other joint tenant.] The other is not mentioned in the rate books. The words "*Atkinson, Mr.*" must apply to *Thomas*, who was clearly treated by the parish as the party rateable. No doubt the Sessions have found that the pauper's husband did occupy the tenement; but, the Sessions having sent up the facts upon which this finding was based, as well as the finding itself, this Court is at liberty to inquire into the propriety of such finding; *Rex v. Field* (*a*). But, assuming that the pauper's husband was the party assessed, the payment by the father would then be perfectly voluntary. His joint tenancy does not raise the presumption of agency. No person is liable to pay the rate but the party actually rated; and payment by another on his behalf would not give him a settlement; *Rex v. Weobley* (*b*). There is no evidence of any request by, or authority from, *William* to *Thomas*; and payment by *Thomas* could not, as in *Rex v. Bridgewater* (*c*), be con-

(*a*) 5 T. R. 587.

(*b*) 2 East, 68.

(*c*) 3 T. R. 550.

*The Queen
v.
Inhabitants of
Husshawte.*

sidered as money paid to the use of *William* at his request. *Queen's Bench.*
1852.

Then, as to the question of renting, it was no doubt held, in *Regina v. St. Lawrence, Appleby* (*a*), that the words "separate and distinct," in stat. 6 *G. 4. c. 57. s. 2.*, apply only to "dwelling house or building," and not to "land." But the section clearly goes on to provide that the tenement, whether dwelling house or land, must be *rented* by one person. [Lord *Campbell C. J. Regina v. St. Lawrence in Appleby* (*a*) is against you on that point.] The attention of the Court there does not appear to have been directed to *Rex v. Berkswell* (*b*), where it was held that the whole subject matter of the demise must be occupied by the party renting the tenement. *Regina v. Caverswall* (*c*) is directly in point.

The QUEEN
v.
Inhabitants of
HUSTHWAITE.

Lord **CAMPBELL C. J.** If there is any evidence of a settlement, either by renting and occupying a tenement or by payment of the rates, upon the facts set out in the case, we are to confirm the order of Sessions; and I am of opinion that there is such evidence. First, as to the renting and occupying: the tenancy of the pauper's husband was a joint tenancy; but this Court, in *Regina v. St. Lawrence, Appleby* (*a*), came to the conclusion, after deliberate discussion, that the words "separate and distinct," in stat. 6 *Geo. 4. c. 57. s. 2.*, apply only to "dwelling house or building," and not to land. The fact of the tenancy being joint is, therefore, immaterial in the present case, the value of the land so held being sufficient to satisfy the provisions of sect. 2. I also

(*a*) 6 *Q. B.* 842.

(*b*) 6 *A. & E.* 282. See *Rex v. Ripon*, 7 *Q. B.* 226.

(*c*) 10 *A. & E.* 270.

*Volume XXIII
1852.*

*The Committee
of the
Inhabitants of
Harrowgate.*

I think there is evidence that the pauper's husband was assessed. It is clear that he was the sole occupier of the farm; and, as it must be presumed that this fact was known to the parish officers, there is evidence to shew that "*Atkinson, Mr.*" in the rate books, referred to him. Then, as to the payment of the rates, and the rent, I think there is evidence to shew that there was, practically, a payment by the pauper's husband. *Thomas Atkinson*, the father, by whom they were actually paid, was not a stranger, but a joint tenant with *William*, and, having paid, might bring an action or a suit in equity for compensation: or, at all events, in settling what may be called the joint account, he might take credit for such payments as having been made on behalf of himself and the other joint tenant. If both had been jointly assessed, and *Thomas* had paid the rate, that would clearly have been a payment by both. I think, therefore, that there is evidence of a sufficient renting and occupying of a tenement by the pauper's husband, and of an assessment upon, and payment of rates by, him; and that therefore the Sessions were justified in finding that he had gained a settlement.

WIGHTMAN J. We are simply to say whether there is any evidence of a settlement, by renting and occupying a tenement, or by payment of rates. That involves two questions; first, whether the pauper's husband was assessed, and, secondly, whether there was a payment of the rates by him. As to the first question, it is clear that he was the party in actual possession of the tenement. There was, therefore, some evidence from which the Sessions might draw the conclusion that "*Atkinson, Mr.*", in the rate books, referred to him. With respect

to the question of payment I have had much more difficulty. However, as *Thomas Atkinson*, by whom the rate was actually paid, had a joint interest with the pauper's husband, and was not a mere stranger, and as the rate is a charge affecting the joint occupation, the payment may be considered as made on behalf of the party really rateable in respect of such occupation.

Queen's Bench.
1852.

The QUEEN
v.
Inhabitants of
HUSTHWAITE.

(ERLE J. was absent.)

CROMPTON J. I feel no doubt whatever that there is evidence to shew that the pauper's husband was assessed. As regards the question of payment, I cannot say that I feel much difficulty. I think there was a payment by both, the father acting as the agent for both. The privity existing between them in respect of their joint tenancy was sufficient to give the father an authority to pay on behalf of the son.

Order of Sessions confirmed.

Sir THOMAS ROKEWOOD GAGE, Bart., against The *Tuesday,
April 27th.*
NEWMARKET Railway Company.

COVENANT. The declaration stated that, after A railway Company, promoting in Parliament a bill for the extension of their line, which extended line would pass through the lands of the plaintiff, covenanted with him as follows: "In the event of the bill hereinbefore mentioned being passed in the present session of Parliament, the said Company shall, *before they shall enter* upon any part of the lands of the said Sir T. R. G." (plaintiff), "pay to the said Sir T. R. G., his heirs or assigns, the sum of 4900*l.*, purchase money, for any portion of his lands, not exceeding 43 acres, which the said Company may, under the powers of their Act, require and take for the purposes of this undertaking. In addition to purchase money as aforesaid, the said Company shall pay to the said Sir T. R. G., his heirs or assigns, *before they shall enter* upon any part of the said land, the sum of 7100*l.* as landlord's compensation

~~1. That the~~ Railway Act 1844,⁵⁵² and before the passing of "The Newmarket and Chesterford Bury Extension and Ely Branch Railway Act 1847,"⁵⁵³ and also before the passing of "The Newmarket and Chesterford Thetford Extension Railway Act 1847,"⁵⁵⁴ to wit made by articles of agreement then made between the defendants by their then style and title of "The Newmarket and Chesterford Railway Company," of the one part, and the plaintiffs of the other part, "the part of which said articles" do "provieth, reciting that it was proposed by the Newmarket and Chesterford Railway Company to construct and maintain a railway from their railway at Newmarket in the county of Cambridge, to Bury St Edmunds in the county of Suffolk, with a branch therefrom to the city of Ely, and, for the purpose of carrying such proposal into effect, the said Newmarket and Chesterford Railway Company were then promoting a bill which had been introduced into the Commons House of Parliament and read a second time, intituled = A bill to enable The Newmarket and Chesterford Railway Company to extend their line of railway to Bury St Edmunds, with a branch to the city of Ely;" and that, according to the plans deposited with the clerks of the peace for the counties through which it was proposed to form the said railway, it appeared that, if made, it would pass through the lands of the plaintiff, situate in &c.: that the plaintiff, being apprehensive that great injury would be done to his property if the said line of railway were to be made as in the said plans delineated, and more particularly if deviations were made therefrom in certain places to the extent of the limits of deviation marked on the said plans, had caused intimation of his intention to oppose the said bill to be given to the promoters thereof; and

(a) See p. 460, post,

for the carriage
of the
goods to the
nearest
station
is
more
expensive
and
costly
than
when
by
them.

Hold:
That the Company
now are
and
will be
able to
make
any
convenient
and
economical
plan
of
the
line
of
the
railway
that
they
choose.

2. That an
abstract
was
made by the
Company to
pay them money
in the plan of
the railway,
in a reasonable
sum after the
passing of the
Act, would
have been alter-
ed, and
paid.

that the said Company were desirous to come to an *Queen's Bench.*
agreement with the plaintiff, upon the terms thereinafter
expressed;

the said Company, for the considerations
therein mentioned, did covenant and agree with the
plaintiff that, in the event of the said bill thereinbefore
recited, and then before Parliament, being passed in the
then present session of Parliament, the said Company
should and would, within a reasonable time in that
behalf after the passing of the said bill, and before the
said Company should enter upon any part of the lands
of the plaintiff situate in &c., pay to the plaintiff, his
heirs or assigns, the sum of 4900*l.*, purchase money, for
any portion of his lands, not exceeding forty three acres,
which the said Company might, under the powers of
their Act, require and take for the purposes of their
undertaking: and further that, in addition to such
purchase money as aforesaid, the said Company should
and would, within a reasonable time in that behalf after
the passing of the said bill, and before they should enter
upon any part of the said lands, pay to the plaintiff, his
heirs or assigns, the sum of 7100*l.*, as landlord's com-
pensation for the damage arising to his estate by the
severance thereof, in respect of the lands, not exceeding
forty three acres, to be taken by them; and that the
Company should, at their own expense, settle all claims
and demands which the plaintiff's tenants might be
entitled to make or demand in consequence of the said
undertaking. The declaration then, after setting out
certain other covenants between the plaintiff and the
Company, averred that the said Company, after the
passing of the said Act of parliament firstly above men-
tioned, to wit on &c., did make and construct the
railways and works by the said first mentioned Act

GAGE
v.
NEWMARKET
Railway
Company.

Volume XVIII. authorized to be made, and that the said bill in the said
1852.

GAGE
v.
NEWMARKET
Railway
Company.

articles of agreement mentioned did pass and become law in the session of Parliament present at the time of making the said articles of agreement, to wit on &c., and became and was and is "The *Newmarket and Chesterford (Bury Extension and Ely Branch) Railway Act, 1847*" (a), above mentioned; and that the plaintiff always, from the time of making the said articles of agreement, was ready and willing to accept and receive from the defendants the said sum of 4900*l.* as the purchase money for any portion of his the plaintiff's said lands in the said articles of agreement in that behalf mentioned, not exceeding forty three acres, which the defendants might, under the powers of their last mentioned Act, require and take for the purposes of their undertaking in and by the same Act authorized; and that the plaintiff was always, from the time of making the said articles of agreement, ready and willing to accept and receive from the defendants, in addition to the said purchase money, the said sum of 7100*l.* in the said articles of agreement mentioned, as landlord's compensation for the damage arising and to arise to the plaintiff's estate in the said articles of agreement mentioned by the severance thereof, in respect of the lands, not exceeding forty three acres, to be taken by them according to the true intent and meaning of the said articles of agreement; that a reasonable time after the passing of the last mentioned Act for the defendants to pay to the plaintiff the said two sums of money above mentioned respectively had elapsed

(a) 10 & 11 Vict. c. xii. (Local and personal, public). Royal Assent 8th June, 1847. By sects. 35, 36, the compulsory powers for the purchase of land are to expire in three years, and the powers for completing the works are to expire in five years, from the passing of the Act.

before the commencement of this suit; and that the plaintiff was always, from the time of the making of the said articles of agreement, ready and willing and able to convey and assure to the defendants all such portions of his said lands in the said articles of agreement mentioned, not exceeding forty three acres, as the defendants might, under the powers of the last mentioned Act, require and take for the purpose of their said undertaking by the same Act authorized; of all which premises the defendants, after the making of the said articles of agreement, to wit on &c., and always from that time until the commencement of this suit, had notice; and that the defendants, after the passing of the last mentioned Act, and before the commencement of this suit, to wit on &c., were requested by the plaintiff to pay to him the said two sums of money respectively; that the plaintiff, after the passing of the last mentioned Act, and before the commencement of this suit, to wit on &c., did give notice to the defendants that he was ready and willing to convey and assure, and did then offer to convey and assure, to the defendants all and every such portion and portions of his said lands in the said articles of agreement mentioned, not exceeding forty three acres, as they the said defendants might, under the powers of the last mentioned Act, require and take for the purposes of their said undertaking by the same Act authorized; and that a reasonable time for the said Company to select and take such portions of the plaintiff's said lands for the purposes in that behalf aforesaid elapsed before the commencement of this suit; yet the defendants had not paid to the plaintiff the said two sums of money, or either of them, or any part thereof.

The defendants set out the articles of agreement upon

VOL. XVIII. N. S. 2 I

Queen's Bench.
1852.

GAGE
v.
NEWMARKET
Railway
Company.

Volume XVIII.
1852.

GAGE
v.
NEWMARKET
Railway
Company.

oyer, which, after the recitals stated in the declaration, contained, among others, the following covenant. "In the event of the bill hereinbefore mentioned being passed in this present session of Parliament, the said Company shall, *before they shall enter* upon any part of the lands of the said Sir *Thomas Rokewood Gage* in the said county of *Suffolk*, pay to the said Sir *T. R. Gage*, his heirs or assigns, the sum of 4900*l.*, purchase money, for any portion of his lands, not exceeding forty three acres, which the said Company may, under the powers of their Act, require and take for the purposes of their undertaking: That, in addition to purchase money as aforesaid, the said Company shall pay to the said Sir *T. R. Gage*, his heirs or assigns, *before they shall enter* upon any part of the said land, the sum of 7100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty three acres, to be taken by them." The defendants then pleaded several pleas, of which the last was "that the extended line of railway and works mentioned in the said articles of agreement, and in 'The Newmarket and Chesterford (Bury Extension and Ely Branch) Railway Act, 1847,' and thereby authorized to be made, hath not, nor hath any part thereof, been made or constructed, or begun to be made and constructed; and that the defendants have not required or taken for the purposes of their said undertaking, or otherwise, any part of the plaintiff's said lands in the said agreement mentioned, or any lands or tenements of the plaintiff whatsoever; nor have they the defendants ever given any notice of requiring or taking any of the said lands in the said articles of agreement mentioned, or any lands or tenements of the plaintiff; nor have they ever agreed with the plaintiff, or any person or persons, for the

purchase or taking of any such lands or tenements as aforesaid, otherwise than by the said articles of agreement." Verification.

General demurrer. Joinder.

Queen's Bench.
1852.

GAGE
v.
NEWMARKET
Railway
Company.

Joseph Addison, for the plaintiff. First, the declaration is good. The considerations for the performance of the covenant by the defendants are, first, the passing of the bill before Parliament; in fact, the absence of opposition by the plaintiff, which was held, in *Lord Howden v. Simpson* (a), to be a good consideration; and, next, the giving up of the land by the plaintiff, when he should be required so to do. The first consideration has been executed; the second the plaintiff is bound to perform when called upon; and the defendants are now bound to pay for the land, upon the principle laid down in *Pordage v. Cole* (b), that, "where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for the breach of the covenant on the part of the defendant, without averring performance in the declaration."

Next, the plea is bad. The taking and entering upon the land is not a condition precedent to the performance of the defendants' covenant; and therefore the fact that the Company have not chosen to exercise their powers under the Act is no answer to the plaintiff's claim. *Pilbrow v. Pilbrow's Atmospheric Railway Company* (c) and *Webb v. The Direct London and Portsmouth Railway*

(a) 10 A. & E. 793, Exch. Ch., reversing judgment of Q. B. Judgment of Exch. Ch. affirmed in Dom. Proc., *Simpson v. Lord Howden*, 9 Cl. & Fin. 61.

(b) 1 Wms. Sann. 320 c. note (4). (6th ed.) (c) 5 Com. B. 440.

Volume XVIII. Company (a) are in point. And in the latter case it
1852.

GAGE
v.
NEWMARKET
Railway
Company.

was held that the expiration, by lapse of time, of the compulsory powers of a railway Company to take land, does not release them from the obligations with respect to the purchase of land which they have contracted during the existence of those powers. Here the whole language of the covenant shews that the defendants intended to make the railway, and enter upon some portion of the plaintiff's land, and pay for it, within a reasonable time in the course of the five years allowed them by the Act for the completion of their works. *Bland v. Crowley* (b) is also an authority for the plaintiff, at all events as regards the breach there averred, by non-payment of a stipulated sum as compensation for damage to arise to the plaintiff's estate by the construction of the railway. [Crompton J. In that case there was no qualification of the covenant. Here the covenant seems to be controlled by the words "before they shall enter."] *Preston v. The Liverpool, Manchester, and Newcastle upon Tyne Junction Railway Company* (c) is, at all events, a case of precisely the same character as the present; and the observations of the Vice Chancellor, in giving judgment, shew that the meaning of the agreement, in both that case and the present one, was that the Company should pay the stipulated sums as the price of the plaintiff's assent and of so much of his land as should be required for the railway (including compensation for damage), whatever might ultimately be the amount of land, if any, so required. The defendants, therefore, having had the benefit of the agreement, are bound to pay the money

(a) 9 *Hare*, 129.

(b) 6 *Exch.* 522.

(c) 1 *Simp. N. S.* 586. 598.

whether they choose to enter upon the lands or not, and, if they do so choose, before they enter. The stipulation, that the money is to be paid before entry, is introduced into the agreement for the purpose of protecting the plaintiff, not of giving the defendants the option of paying or not.

Queen's Bench.
1852.

GAGE
v.
NEWMARKET
Railway
Company.

Bramwell, contrà. First, the plea is good. By the terms of the agreement it is clear that no money is to be paid by the defendants until the land is taken by them. And they are not bound to take it. The declaration does not aver the not taking of the land as a breach; the only breach is the nonpayment of the two sums of money for purchase and compensation. But the defendants are not obliged to pay if they do not take; all they agree to do is, if they enter, to pay first. It would be most unreasonable to adopt the plaintiff's construction. The agreement was evidently intended as a substitute for the usual arrangements under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18.; and, under sect. 84 of that statute, entry upon the land by the Company is clearly necessary to entitle the landowner to the purchase money. The fact is that a case has arisen which the parties to the agreement probably did not contemplate; but, under these circumstances, the defendants are not to be made liable for a state of things not provided for in the contract. The agreement alone can be looked at: and the fact that it contains no covenant by the plaintiff to convey, and no covenant for title, strongly favours the conclusion that it was not intended to make the taking of the land imperative upon the defendants. It recites, moreover, that, *if* the railway is made, injury will be caused to the plaintiff's estate; and

Volume XVIII. therefore does not treat the construction of the railway
 1852. as certain. It has been contended that the words
 "before they shall enter" were introduced merely for
 the purpose of protecting the plaintiff from entry by the
 Company before payment. If so, the natural deduction
 is, that the payment is in consideration of the entry,
 and is not to be made if that consideration does not take
 effect. The sum by way of compensation for damage,
 moreover, is to be paid in respect of "the severance"
 of the plaintiff's land. The land, therefore, must be
 entered upon by the Company before such compensa-
 tion is payable. The reasoning of *Parke* B., in *Bland*
v. Crowley (*a*) shews that neither of the breaches in
 this declaration can be sustained. The learned Judge
 says: "If no land should be required, the stipulated
 price would not be payable, and as none was required,
 the defendants cannot be called upon to pay any part
 of the price." That is the state of things in the present
 case. The decision in *Webb v. The Direct London &*
Portsmouth Railway Company (*b*) was much shaken
 when it came before the Lords Justices (*c*). Lord
 Justice *Cranworth* there says that the breach ought
 to be the not taking the land. And the opinion there
 expressed was acted upon by the same Court in a
 similar case, *Lord James Stuart v. London & North*
Western Railway Company (*d*).

Next, the declaration is bad. It alleges an agreement
 by the defendants to pay within a reasonable time,
 which had elapsed. Now a reasonable time for that

(*a*) 6 *Exch.* 522. 530.

(*b*) 9 *Hare*, 129.

(*c*) *Webb v. The Direct London and Portsmouth Railway Company*,
 1 *De G. Macn. & Gord.* 521.

(*d*) 1 *De G. Macn. & Gord.* 721.

purpose cannot elapse until the defendants require to take; and they may do so at any time within five years from the passing of their special Act, a period which has not yet expired.

Further, the agreement itself is invalid. It is ultra vires on the part of the defendants. At the time when it was entered into, they were incorporated only as a Company for making a railway from *Newmarket* to *Chesterford*, and therefore had no power to make any contract except for the purposes of that particular undertaking, or to agree for the purchase of land which they might never have the legislative authority for taking; *The East Anglian Railways Company v. The Eastern Counties Railway Company (a)*. [Lord Campbell C. J. In *Lord Howden v. Simpson (b)* the agreement was made before the special Act was passed.] There, as in all cases where a similar agreement has been held good, the contract was made with some individual competent to contract, and was afterwards sanctioned by the Company.

J. Addison, in reply. The contract here is not beyond the scope of the Company's powers, as in *The East Anglian Railways Company v. The Eastern Counties Railway Company (a)*. [Lord Campbell C. J. The Company agree to pay a certain part of the funds of the shareholders for what they may not, and eventually do not, require. If they pay even though they do not enter, surely that is a misappropriation of the funds.] Such a bargain might be advantageous for the general objects of the Company; it is, in fact, buying the power to purchase land if they like. That buying is legalized

Queen's Bench.
1852.

GAGE
v.
NEWMARKET
Railway
Company.

(a) 11 *Com. B.* 775.

(b) 10 *A. & E.* 793.

Volume XVIII. Railway Act, 1846," and before the passing of "The Newmarket and Chesterford (*Bury Extension and Ely Branch*) Railway Act, 1847,"(a), and also before the

GAGE
v.

NEWMARKET
Railway
Company.

for the damage
arising to his
estate by the
severance
thereof, in
respect of the
lands, not ex-
ceeding 43
acres, to be
taken by
them."

Held: 1.
That the Company were not bound to pay either of these sums unless they entered upon some part of the plaintiff's lands.

2. That an absolute covenant by the Company to pay these sums to the plaintiff, in a reasonable time after the passing of the Act, would have been ultra vires, and void.

passing of "The Newmarket and Chesterford (*Thetford Extension*) Railway Act, 1847," to wit on &c., by articles of agreement then made between the defendants, by their then style and title of "The Newmarket and Chesterford Railway Company," of the one part, and the plaintiffs of the other part, "one part of which said articles" &c. (profert), reciting that it was proposed by the Newmarket and Chesterford Railway Company to construct and maintain a railway from their railway at *Newmarket* in the county of *Cambridge*, to *Bury St. Edmonds* in the county of *Suffolk*, with a branch therefrom to the city of *Ely*, and, for the purpose of carrying such proposal into effect, the said Newmarket and Chesterford Railway Company were then promoting a bill which had been introduced into the Commons House of Parliament and read a second time, intituled "A bill to enable The Newmarket and Chesterford Railway Company to extend their line of railway to *Bury St. Edmonds*, with a branch to the city of *Ely*;" and that, according to the plans deposited with the clerks of the peace for the counties through which it was proposed to form the said railway, it appeared that, if made, it would pass through the lands of the plaintiff, situate in &c.: that the plaintiff, being apprehensive that great injury would be done to his property if the said line of railway were to be made as in the said plans delineated, and more particularly if deviations were made therefrom in certain places to the extent of the limits of deviation marked on the said plans, had caused intimation of his intention to oppose the said bill to be given to the promoters thereof; and

(a) See p. 460, post,

that the said Company were desirous to come to an *Queen's Bench.*
agreement with the plaintiff, upon the terms thereinafter *1852.*

expressed; the said Company, for the considerations
therein mentioned, did covenant and agree with the
plaintiff that, in the event of the said bill thereinbefore
recited, and then before Parliament, being passed in the
then present session of Parliament, the said Company
should and would, within a reasonable time in that
behalf after the passing of the said bill, and before the
said Company should enter upon any part of the lands
of the plaintiff situate in &c., pay to the plaintiff, his
heirs or assigns, the sum of 4900*l.*, purchase money, for
any portion of his lands, not exceeding forty three acres,
which the said Company might, under the powers of
their Act, require and take for the purposes of their
undertaking: and further that, in addition to such
purchase money as aforesaid, the said Company should
and would, within a reasonable time in that behalf after
the passing of the said bill, and before they should enter
upon any part of the said lands, pay to the plaintiff, his
heirs or assigns, the sum of 7100*l.*, as landlord's com-
pensation for the damage arising to his estate by the
severance thereof, in respect of the lands, not exceeding
forty three acres, to be taken by them; and that the
Company should, at their own expense, settle all claims
and demands which the plaintiff's tenants might be
entitled to make or demand in consequence of the said
undertaking. The declaration then, after setting out
certain other covenants between the plaintiff and the
Company, averred that the said Company, after the
passing of the said Act of parliament firstly above men-
tioned, to wit on &c., did make and construct the
railways and works by the said first mentioned Act

GAGE
v.
NEWMARKET
Railway
Company.

Volume XVIII. authorized to be made, and that the said bill in the said
1852. articles of agreement mentioned did pass and become

GAGE
v.
NEWMARKET
Railway
Company.

law in the session of Parliament present at the time of making the said articles of agreement, to wit on &c., and became and was and is "The *Newmarket and Chesterford (Bury Extension and Ely Branch) Railway Act, 1847*"^(a), above mentioned; and that the plaintiff always, from the time of making the said articles of agreement, was ready and willing to accept and receive from the defendants the said sum of 4900*l.* as the purchase money for any portion of his the plaintiff's said lands in the said articles of agreement in that behalf mentioned, not exceeding forty three acres, which the defendants might, under the powers of their last mentioned Act, require and take for the purposes of their undertaking in and by the same Act authorized; and that the plaintiff was always, from the time of making the said articles of agreement, ready and willing to accept and receive from the defendants, in addition to the said purchase money, the said sum of 7100*l.* in the said articles of agreement mentioned, as landlord's compensation for the damage arising and to arise to the plaintiff's estate in the said articles of agreement mentioned by the severance thereof, in respect of the lands, not exceeding forty three acres, to be taken by them according to the true intent and meaning of the said articles of agreement; that a reasonable time after the passing of the last mentioned Act for the defendants to pay to the plaintiff the said two sums of money above mentioned respectively had elapsed

(a) 10 & 11 Vict. c. xii. (Local and personal, public). Royal Assent 8th June, 1847. By sects. 35, 36, the compulsory powers for the purchase of land are to expire in three years, and the powers for completing the works are to expire in five years, from the passing of the Act.

before the commencement of this suit; and that the plaintiff was always, from the time of the making of the said articles of agreement, ready and willing and able to convey and assure to the defendants all such portions of his said lands in the said articles of agreement mentioned, not exceeding forty three acres, as the defendants might, under the powers of the last mentioned Act, require and take for the purpose of their said undertaking by the same Act authorized; of all which premises the defendants, after the making of the said articles of agreement, to wit on &c., and always from that time until the commencement of this suit, had notice; and that the defendants, after the passing of the last mentioned Act, and before the commencement of this suit, to wit on &c., were requested by the plaintiff to pay to him the said two sums of money respectively; that the plaintiff, after the passing of the last mentioned Act, and before the commencement of this suit, to wit on &c., did give notice to the defendants that he was ready and willing to convey and assure, and did then offer to convey and assure, to the defendants all and every such portion and portions of his said lands in the said articles of agreement mentioned, not exceeding forty three acres, as they the said defendants might, under the powers of the last mentioned Act, require and take for the purposes of their said undertaking by the same Act authorized; and that a reasonable time for the said Company to select and take such portions of the plaintiff's said lands for the purposes in that behalf aforesaid elapsed before the commencement of this suit; yet the defendants had not paid to the plaintiff the said two sums of money, or either of them, or any part thereof.

The defendants set out the articles of agreement upon

VOL. XVIII. N. S. 21

Queen's Bench.
1852.

GAGE
v.
NEWMARKET
Railway
Company.

Volume XVIII.
1852.

GAGE
v.
NEWMARKET
Railway
Company.

oyer, which, after the recitals stated in the declaration, contained, among others, the following covenant. "In the event of the bill hereinbefore mentioned being passed in this present session of Parliament, the said Company shall, *before they shall enter* upon any part of the lands of the said Sir *Thomas Rokewood Gage* in the said county of *Suffolk*, pay to the said Sir *T. R. Gage*, his heirs or assigns, the sum of 4900*l.*, purchase money, for any portion of his lands, not exceeding forty three acres, which the said Company may, under the powers of their Act, require and take for the purposes of their undertaking: That, in addition to purchase money as aforesaid, the said Company shall pay to the said Sir *T. R. Gage*, his heirs or assigns, *before they shall enter* upon any part of the said land, the sum of 7100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty three acres, to be taken by them." The defendants then pleaded several pleas, of which the last was "that the extended line of railway and works mentioned in the said articles of agreement, and in 'The Newmarket and Chesterford (Bury Extension and Ely Branch) Railway Act, 1847,' and thereby authorized to be made, hath not, nor hath any part thereof, been made or constructed, or begun to be made and constructed; and that the defendants have not required or taken for the purposes of their said undertaking, or otherwise, any part of the plaintiff's said lands in the said agreement mentioned, or any lands or tenements of the plaintiff whatsoever; nor have they the defendants ever given any notice of requiring or taking any of the said lands in the said articles of agreement mentioned, or any lands or tenements of the plaintiff; nor have they ever agreed with the plaintiff, or any person or persons, for the

purchase or taking of any such lands or tenements as *Queen's Benc.*
aforesaid, otherwise than by the said articles of agree-
ment." Verification.

General demurrer. Joinder.

*GAGE
v.
NEWMARKEI
Railway
Company.*

Joseph Addison, for the plaintiff. First, the declaration is good. The considerations for the performance of the covenant by the defendants are, first, the passing of the bill before Parliament; in fact, the absence of opposition by the plaintiff, which was held, in *Lord Howden v. Simpson* (*a*), to be a good consideration; and, next, the giving up of the land by the plaintiff, when he should be required so to do. The first consideration has been executed; the second the plaintiff is bound to perform when called upon; and the defendants are now bound to pay for the land, upon the principle laid down in *Pordage v. Cole* (*b*), that, "where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for the breach of the covenant on the part of the defendant, without averring performance in the declaration."

Next, the plea is bad. The taking and entering upon the land is not a condition precedent to the performance of the defendants' covenant; and therefore the fact that the Company have not chosen to exercise their powers under the Act is no answer to the plaintiff's claim. *Pilbrow v. Pilbrow's Atmospheric Railway Company* (*c*) and *Webb v. The Direct London and Portsmouth Railway*

(*a*) 10 *A. & E.* 793, Exch. Ch., reversing judgment of Q. B. Judgment of Exch. Ch. affirmed in Dom. Proc., *Simpson v. Lord Howden*, 9 *Cl. & Fin.* 61.

(*b*) 1 *Wms. Saun.* 320 c. note (4). (6th ed.) (*c*) 5 *Com. B.* 440.

Volume XVIII. Company (a) are in point. And in the latter case it
 1852. was held that the expiration, by lapse of time, of the compulsory powers of a railway Company to take land, does not release them from the obligations with respect to the purchase of land which they have contracted during the existence of those powers. Here the whole language of the covenant shews that the defendants intended to make the railway, and enter upon some portion of the plaintiff's land, and pay for it, within a reasonable time in the course of the five years allowed them by the Act for the completion of their works. *Bland v. Crowley* (b) is also an authority for the plaintiff, at all events as regards the breach there averred, by non-payment of a stipulated sum as compensation for damage to arise to the plaintiff's estate by the construction of the railway. [Crompton J. In that case there was no qualification of the covenant. Here the covenant seems to be controlled by the words "before they shall enter."] *Preston v. The Liverpool, Manchester, and Newcastle upon Tyne Junction Railway Company* (c) is, at all events, a case of precisely the same character as the present; and the observations of the Vice Chancellor, in giving judgment, shew that the meaning of the agreement, in both that case and the present one, was that the Company should pay the stipulated sums as the price of the plaintiff's assent and of so much of his land as should be required for the railway (including compensation for damage), whatever might ultimately be the amount of land, if any, so required. The defendants, therefore, having had the benefit of the agreement, are bound to pay the money

(a) 9 *Hare*, 129.(b) 6 *Exch.* 522.(c) 1 *Simp. N. S.* 586. 598.

whether they choose to enter upon the lands or not, and, if they do so choose, before they enter. The stipulation, that the money is to be paid before entry, is introduced into the agreement for the purpose of protecting the plaintiff, not of giving the defendants the option of paying or not.

Queen's Bench.
1852.

GAGE
v.
NEWMARKET
Railway
Company.

Bramwell, contra. First, the plea is good. By the terms of the agreement it is clear that no money is to be paid by the defendants until the land is taken by them. And they are not bound to take it. The declaration does not aver the not taking of the land as a breach; the only breach is the nonpayment of the two sums of money for purchase and compensation. But the defendants are not obliged to pay if they do not take; all they agree to do is, if they enter, to pay first. It would be most unreasonable to adopt the plaintiff's construction. The agreement was evidently intended as a substitute for the usual arrangements under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18.; and, under sect. 84 of that statute, entry upon the land by the Company is clearly necessary to entitle the landowner to the purchase money. The fact is that a case has arisen which the parties to the agreement probably did not contemplate; but, under these circumstances, the defendants are not to be made liable for a state of things not provided for in the contract. The agreement alone can be looked at: and the fact that it contains no covenant by the plaintiff to convey, and no covenant for title, strongly favours the conclusion that it was not intended to make the taking of the land imperative upon the defendants. It recites, moreover, that, if the railway is made, injury will be caused to the plaintiff's estate; and

Volume XVIII. therefore does not treat the construction of the railway as certain. It has been contended that the words "before they shall enter" were introduced merely for the purpose of protecting the plaintiff from entry by the Company before payment. If so, the natural deduction is, that the payment is in consideration of the entry, and is not to be made if that consideration does not take effect. The sum by way of compensation for damage, moreover, is to be paid in respect of "the severance" of the plaintiff's land. The land, therefore, must be entered upon by the Company before such compensation is payable. The reasoning of *Parke B.*, in *Bland v. Crowley* (*a*) shews that neither of the breaches in this declaration can be sustained. The learned Judge says: "If no land should be required, the stipulated price would not be payable, and as none was required, the defendants cannot be called upon to pay any part of the price." That is the state of things in the present case. The decision in *Webb v. The Direct London & Portsmouth Railway Company* (*b*) was much shaken when it came before the Lords Justices (*c*). Lord Justice *Cranworth* there says that the breach ought to be the not taking the land. And the opinion there expressed was acted upon by the same Court in a similar case, *Lord James Stuart v. London & North Western Railway Company* (*d*).

Next, the declaration is bad. It alleges an agreement by the defendants to pay within a reasonable time, which had elapsed. Now a reasonable time for that

(*a*) 6 Exch. 522. 530.

(*b*) 9 Hare, 129.

(*c*) *Webb v. The Direct London and Portsmouth Railway Company*, 1 De G. Macn. & Gord. 521.

(*d*) 1 De G. Macn. & Gord. 721.

purpose cannot elapse until the defendants require to take ; and they may do so at any time within five years from the passing of their special Act, a period which has not yet expired.

Further, the agreement itself is invalid. It is ultra vires on the part of the defendants. At the time when it was entered into, they were incorporated only as a Company for making a railway from *Newmarket* to *Chesterford*, and therefore had no power to make any contract except for the purposes of that particular undertaking, or to agree for the purchase of land which they might never have the legislative authority for taking ; *The East Anglian Railways Company v. The Eastern Counties Railway Company (a)*. [Lord Campbell C. J. In *Lord Howden v. Simpson (b)* the agreement was made before the special Act was passed.] There, as in all cases where a similar agreement has been held good, the contract was made with some individual competent to contract, and was afterwards sanctioned by the Company.

Queen's Bench.
1852.

GAGE
v.
NEWMARKET
Railway
Company.

J. Addison, in reply. The contract here is not beyond the scope of the Company's powers, as in *The East Anglian Railways Company v. The Eastern Counties Railway Company (a)*. [Lord Campbell C. J. The Company agree to pay a certain part of the funds of the shareholders for what they may not, and eventually do not, require. If they pay even though they do not enter, surely that is a misappropriation of the funds.] Such a bargain might be advantageous for the general objects of the Company ; it is, in fact, buying the power to purchase land if they like. That buying is legalized

(a) 11 *Com. B.* 775.

(b) 10 *A. & E.* 793.

Volume XI; III. by the passing of the special Act. The analogy suggested, between the provisions of the agreement and those of sect. 84 of the Lands Clauses Consolidation Act, is in favour of the plaintiff; for under that section the Company would clearly be liable to be sued upon the agreement or the award, even though they had not entered.

GAGE
v.
NEW MARKET
Railway
Company.

Cur. adv. vult.

Lord CAMPBELL C. J., on a subsequent day in this term (*May* 3d), delivered the judgment of the Court.

We are of opinion that the defendants are entitled to our judgment. Taking the deed as set out on oyer, we think that there is no breach well assigned upon it. The covenant there (without saying anything, as the declaration does, about "reasonable time") is merely in these words: "That, in the event of the bill hereinbefore mentioned being passed in the present session of Parliament, the said Company shall, *before they shall enter upon any part of the lands of the said Sir Thomas Rokewood Gage* in the said county of *Suffolk*, pay to the said Sir T. R. G., his heirs or assigns, the sum of 4900*l.*, purchase money, for any portion of his lands, not exceeding forty three acres, which the said Company may, under the powers of their Act, require and take for the purposes of their undertaking: That, in addition to purchase money as aforesaid, the said Company shall pay to the said Sir T. R. G., his heirs and assigns, *before they shall enter upon any part of the said land*, the sum of 7100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty three acres, to be taken by them." The question we have to determine is,

whether, the Company never having entered upon any part of the plaintiff's lands, he is now entitled to sue for these two sums or either of them.

*Queen's Be,
1852.*

The 4900*l.* is declared to be the purchase money for the land to be required and taken; and the only time of payment mentioned is, before the Company enter on the land. Therefore, if no land is required or taken, and the Company never enter on any part of the land, there seems great difficulty in saying that there has been a breach of covenant in not paying the money. So, the 7100*l.* is declared to be a compensation for severance of the land taken from the rest of the plaintiff's land; and the same time of payment is defined: but there has been no severance to be compensated; and the time for payment has not accrued.

GAGE
v.
NEWMARKT
Railway
Company

This deed does not bargain for a sum of money to be paid absolutely by the Company to the plaintiff as a consideration for his withdrawing his opposition to the bill, but provides a peculiar mode of estimating the value of the land to be taken, and of the compensation to be made for severance damage, instead of the modes pointed out by the general Acts upon this subject. We therefore do not think that the Company can be considered as having absolutely covenanted to pay 12000*l.* to the plaintiff in a reasonable time after the passing of the Act.

If this deed could bear such a construction, we should have thought it so far ultra vires and void. Here the railway Company are the covenantors; and, if the present action lies, the capital paid up by the shareholders must be answerable for the damages to be recovered. We consider that this would be a misappropriation of the funds of the Company, which the directors could not lawfully make.

Volume XVIII.
1852.

GAGE
v.
NEWMARKET
Railway
Company.

All the cases relied upon by the plaintiff's counsel are clearly distinguishable from the present, except *Webb v. The Direct London & Portsmouth Railway Company* (*a*), before Vice Chancellor *Turner*. Notwithstanding our high respect for that learned Judge, we cannot concur in the reasons for his decision; and, although it has not been expressly overturned, its authority was greatly shaken when it came before the Lords Justices of Appeal (*b*).

We do not feel it necessary to give any opinion upon the case of *Bland v. Crowley* (*c*), in which the learned Judges of the Court of Exchequer were divided; as the deed there discussed varies materially from the present. Nor would it be proper to give any opinion upon *Stuart v. London & North Western Railway Company* (*d*), as we learn that, when it came before the Lords Justices of Appeal, it was sent by them to be decided in a Court of law.

We are happy to think that, the question in this case being on the record, it may be brought before a Court of error. In the mean while there must be judgment for the defendants.

Judgment for defendants (*e*).

(*a*) 9 *Hare*, 129.

(*b*) *Webb v. The Direct London & Portsmouth Railway Company*, 1 *De G. Macn. & Gord.* 521.

(*c*) 6 *Exch.* 522.

(*d*) 1 *De G. Macn. & Gord.* 721.

(*e*) See *Mc Gregor v. Dover and Deal Railway &c. Company*, post; *Mayor of Norwich v. Norfolk Railway Company*, 4 *E. & B.* 397.

Queen's Bench.
1852.

LLOYD against JOHN EDWARD OLIVER.

Tuesday,
May 4th.

THE first count of the declaration stated that one *Henry Oliver*, on 17th July 1851, made his bill of exchange in writing, and delivered it to defendant, and thereby required defendant to pay to plaintiff 99*l*. 15*s*. two months after the date thereof, which period had elapsed before the commencement of this suit; and that defendant accepted the same and promised plaintiff to pay the same according to the tenor and effect thereof.

There was a second count, claiming the same sum on an account stated.

Pleas: 1. That defendant did not accept the bill of exchange in the first count mentioned, in manner and form &c. Issue thereon.

2. To the second count: Non assumpsit. Issue thereon.

On the trial, before *Erle J.*, at the *London* sittings in last *Trinity Term*, the following document was put in evidence by the plaintiff.

"London, July 17th, 1851.

£99 : 15s.

Two months after date I promise to pay to Mr. *T. R. Lloyd* or order the sum of ninety nine pounds fifteen shillings for value received.

John Edward Oliver,
Birmingham.

Henry Oliver.

Across this was written: "Accepted, payable *Spooner, Attwood & Co., Bankers, London. Edward Oliver.*"

It was proved that "*Edward Oliver*" was the signature of the defendant.

An instrument was drawn in the following form: "Two months after date I promise to pay to *T. R. L.*" (plaintiff) "or order 99*l*. 15*s*." "*H. Oliver.*"

Underneath was written, on the left hand of the instrument, "*J. E. Oliver*" (defendant). Across it was written "accepted, payable *S. & Co., Bankers, London. E. Oliver.*" "*E. Oliver*" was signed by defendant.

Held, that the instrument might be sued upon as a bill of exchange drawn by *H. Oliver* upon, and accepted by, defendant.

Per Lord *Campbell C. J.*, Such an instrument would be good as a bill of exchange, as against the drawer, even before acceptance.

Volume XVIII.
1852.
 LLOYD
v.
 OLIVER.

It was objected, for the defendant, that this document was not a bill of exchange. The learned Judge was of opinion that it might be declared upon as such, and directed a verdict for the plaintiff, leave being reserved to move to enter a verdict for the defendant.

J. Gray now moved accordingly. In *Edis v. Bury* (a) a document like this was held to be not a bill of exchange but a promissory note. [Lord *Campbell* C. J. What the Court there held was that it might be treated as a promissory note, if the holder chose.] *Littledale* J. there said that it could not be a bill of exchange. [Lord *Campbell* C. J. The document here says, in effect, I will pay if the party to whom this is addressed does not accept, or if he does not pay after he has accepted. It is a bill of exchange containing that additional promise to the payee.] There are no words of request; it cannot be said that merely putting *John Edward Oliver*'s name at the bottom of the document is a request to him by the maker of the instrument to pay. [Lord *Campbell* C. J. I do not see what else it can mean. *Crompton* J. The acceptance, at all events, shews the meaning of *John Edward Oliver*'s name being at the bottom of the instrument.] Even if that were so, the instrument could not be a bill of exchange, or anything but a promissory note, until it had been accepted; but the declaration treats it as if it were a bill of exchange at the time of the making.

Lord *CAMPBELL* C. J. I am of opinion that this instrument, even before acceptance, might be treated as a bill of exchange as against *Henry Oliver*, the drawer.

(a) 6 *B. & C.* 433.

As against the defendant it is clearly a bill of exchange. It is directed to *John Edward Oliver*; that must mean that *John Edward Oliver* is requested to pay the sum mentioned at two months after date, although there are no express words of request. The words "I promise to pay" need not be rejected; they are to be considered as an expression of what otherwise would be implied, namely, that the maker will pay if the acceptor do not. The instrument is ambiguous, and might, no doubt, if the plaintiff chose, be treated as a promissory note. That is the effect of the decision in *Edis v. Bury* (a).

Queen's Bench.
1832.

LLOYD
v.
OLIVER.

ERLE J. As against the defendant, this instrument is clearly a bill of exchange. We must construe the language of it according to known mercantile usage. It has always been the custom, in drawing bills of exchange, to place the name of the party to whom the bill is directed in that part of the instrument where, in the present case, the name of *John Edward Oliver*, the defendant, is placed. According to the same rule, the word "accepted," followed by a signature, as in the present instrument, implies acceptance of the bill by the party signing. I recollect that it was proved at the trial that the instrument had never been out of the hands of the parties to it until it was in its present form: so that it never could have been simply a promissory note, as has been suggested. It is not unjust to presume that it was drawn in this form for the purpose of suing upon it either as a promissory note or as a bill of exchange.

CROMPTON J. The instrument contains, in my opi-

(a) 6 *B. & C.* 433.

Volume XVIII. nion, a clear direction to *John Edward Oliver* to pay, 1852.
 and a clear acceptance by him. It is, therefore, a bill of exchange. But it has been decided, and it is most important that the decision should not be impeached, that equivocal instruments of this kind, possessing the character both of promissory notes and of bills of exchange, may be treated as either.

LLOYD
v.
OLIVER.

Rule refused (a).

(a) *Wightman J.* was absent.

Tuesday,
May 4th.

WILSON against EDEN and others.

Testator, by his will, made in 1815, but confirmed by a codicil in 1841 (see stat. 1 Vict. c. 26. s. 34.), after directing payment of his debts and funeral and testamentary expences, and giving certain annuities, with which he charged his real estate, and certain legacies, bequeathed "all the rest, residue and remainder" of his "personal estate, goods, and chattels, whatsoever and wheresoever," to his brother *M.* "absolutely, to and for his own use and benefit." He then devised as follows: "I give and devise all and singular my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes and hereditaments, situate, lying, arising or being at or near" &c., in the county, &c., "and a parcel of land purchased by me" of *M. L.* at &c., in the county, &c., "and all other my real estates in the said counties of" &c. "and elsewhere in Great Britain, and all my estate and interest therein," to trustees, to hold the same (subject to the said annuities) to the use of his said brother *M.* for life, remainder to the issue of the said *M.* in tail male; in default of such issue, to *W. E.* and his heirs.

At the time of making his will, and at his decease, testator was possessed of freehold estates in both the said counties, and of lands held under certain church leases in one of them, which had been, according to the usual practice of the lessors, renewed every seven years. These leaseholds were distinct from, but near, and, in some places, contiguous to, the freeholds; some of them were let and occupied with the freeholds, at undivided yearly rents. Cottages, ornamental and otherwise, were built upon part; and on part were buildings occupied by labourers employed upon the freehold estates.

Held, that, under stat. 7 W. 4 & 1 Vict. c. 26. s. 26., the leasehold estates in question passed under the general devise of the realty; there being no contrary intention apparent on the will.

(a) The same case had been previously sent for the opinion of the Court of Exchequer. See *Wilson v. Eden*, 11 Beav. 237. 253; and *Wilson v. Eden*, 5 Exch. 752.

dated 14th *April* 1815; and, after directing the payment of all his debts, funeral and testamentary expenses, and after giving certain annuities (with the payment of which he charged his real estates), and after giving certain legacies, he thereby gave and bequeathed as follows: "I give and bequeath all the rest, residue, and remainder of my personal estate, goods, and chattels, whatsoever and wheresoever, after and subject to the payment of my just debts, funeral and testamentary expenses and the said legacies and bequests (except the said annuities) hereinbefore by me given as aforesaid, and all my estate and interest therein, unto my brother, *Morton John Davison Esq.*, late *Morton John Eden*, absolutely, to and for his own use and benefit." And the said testator gave and devised as follows: "I give and devise all and singular my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes and hereditaments, situate, lying, arising or being at or near *Windlestone, West Auckland, St. Helen's Auckland*, and *Bishop's Auckland*, in the county of *Durham* or in the city of *Durham*, and *Brignal* in the county of *York*, and a parcel of land purchased by me of the late *Mrs. Mary Lambton* at *Romanby*, near *North Allerton*, in the North Riding of the county of *York*, and all other my real estates in the said counties of *Durham* and *York*, and elsewhere in *Great Britain*, and all my estate and interest therein, unto *Robert Eden Duncombe Shafto*, of *Whitworth*, in the county of *Durham*, Esq., *William Nesfield*, of *Brancepeth*, in the county of *Durham*, Clerk, and *Thomas Hopper*, of the city of *Durham*, Esq., and their heirs, subject to the said annuities so given and devised as aforesaid; to hold the same unto the said *R. E. D. Shafto*, *W. Nesfield*, and *T. Hopper*, and their

Queen's Bench.
1852.

WILSON.
v.
EDEN.

Volume XVIII. heirs, subject as aforesaid, to and for the several uses,
1852. upon the trusts, and to and for the intents and purposes,

WILSON.
v.
EDEN.

and under and subject to the powers, provisoies, declarations and limitations, hereinafter limited, declared or expressed of and concerning the same, that is to say: To the use of my said brother, the said *Morton John Davison*, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste: And, from and immediately after the determination of that estate by forfeiture or otherwise in his lifetime, then to the use of the said *R. E. D. Shafto*, *W. Nesfield* and *T. Hopper*, and their heirs, during the life of the said *Morton John Davison*, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions, as occasion shall require; but nevertheless to permit and suffer the said *Morton John Davison* and his assigns, during his life, to receive and take the rents, issues, and profits of the said hereditaments and premises, to and for his or their own use and benefit: And, from and immediately after his decease, to the use of the first son of the said *Morton John Davison*, lawfully begotten, and of the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the use of the second, third, fourth, and all and every other the son and sons of the said *Morton John Davison*, lawfully to be begotten, severally, successively, and in remainder, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body, being always to be preferred and

take before the younger of such sons and the heirs male of his and their body and bodies: And, in default of such issue, to the use of Sir *William Eden*, Bart., his heirs and assigns for ever." And the said testator thereby constituted and appointed the said *Morton John Davison* executor of his said will.

*Queen's Bench
1852.*

**WILSON.
v.
EDEN.**

The testator afterwards signed and published a testamentary paper, bearing date the 9th *March* 1835, purporting to be a codicil to his said will, and containing certain additions to, and alterations of, the annuities bequeathed by his said will, but not in any other manner affecting such will.

Morton John Davison, the brother of the testator and the sole executor named in the will, died on the 28th *June* 1841, in the lifetime of the said testator, and without ever having had any issue; and, after his death, the testator duly signed and published another codicil to his said will, in the words and figures following:— "This is a codicil to the last will and testament of me, Sir *Robert Johnson Eden*, of *Windlestone*, in the county of *Durham*, Bart., which will is dated the 14th day of *April* 1815. Whereas, by my said will, I appointed as the executor thereof my late only brother *Morton John Davison Esq.*, who died on the 28th day of *June* last: Now I do, by this codicil, appoint my nephew *John Methold Esq.* the sole executor of my said will: And I hereby ratify, confirm, and republish my said will. As witness my hand, this 10th day of *July*, 1841. *Robert Johnson Eden.*" (Then followed the attestation.)

The said *John Methold* afterwards took the name of *Eden*, instead of *Methold*.

The testator died on the 3d *September* 1844, without having revoked or altered his said will, except so far as

Volume XVIII. the same was altered by the said codicils thereto, and
1852. without having revoked or altered the said codicils, or

WILSON.
v.
EDEN.

either of them. And the said will and codicils have since been duly proved by the said *John Eden*, the executor thereof.

The testator was, at the time of his death, possessed of several leasehold estates in the townships of *Merrington* and *Middlestone*, both now in the parish of *Merrington* in the county of *Durham*, held under various leases from the Dean and Chapter of *Durham* for terms of twenty one years respectively, a part of which leasehold estates was acquired by the testator's father, in the year 1772, and the remaining portions thereof had been acquired by his said father or himself at various times since. (The case then set out the dates of the several purchases.) And the Dean and Chapter of *Durham* have hitherto renewed the leases under which the said estates were held at the end of every seven years, according to their usual custom with respect to property held under leases from them; but the leases contained no covenant on their part to do so.

In the year 1833 the Dean and Chapter of *Durham* demised the coal mines under the said leasehold estates, and other adjoining lands, with power to erect cottages and make a railway: and several cottages have accordingly been erected, and a railway made through part of the said leasehold estates. The testator was not, at the time of his death, possessed of or entitled to any leasehold estates for years, except in the townships of *Merrington* and *Middlestone*.

The township of *Middlestone* was heretofore in the parish of *St. Andrew Auckland*, but was, on the 26th April 1845, annexed to the said parish of *Merrington*.

The parish of *Merrington* is intersected by a high ridge of hills, ranging east and west, upon the summit of which the church and village of *Merrington* are situated; and the greater portion of the said leasehold estates (to the extent of 539 acres or thereabouts) lie to the south of the said ridge, and extend to and (for about 2050 yards) abut on the northern boundary of the freehold manor and estate of the testator, in the township of *Windlestone*, heretofore in the parish of *St. Andrew Auckland*, but now forming part of the new parish of *Counden*, which was made a parish in the year 1842, and adjoin the said freehold estate of *Windlestone*, but are in part separated therefrom by a turnpike road, and in part by the ordinary hedges of the country, through which are necessary communications for those tenants who hold both freehold and leasehold in the same farm; and in some instances the leaseholds were let and occupied with the said freeholds, at undivided yearly rents.

Queen's Bench.
1852.

WILSON.
v.
EDEN.

The said leasehold estates are not intermixed with, or surrounded by, the freehold lands of the said testator at *Windlestone*; but, with the exception of one plot, containing about 18 acres, they lie together, and part of them are about a quarter of a mile from the mansion of *Windlestone*; but the turnpike road between *Bishop's Auckland* and *Rushyford* lies between them and the said mansion. The remainder of the said leasehold estates, containing about 72 acres, lie on the northern side of the aforesaid ridge, and about two miles from the said testator's freehold mansion and estate at *Windlestone*.

The testator was, at the respective dates of making his will and of his death, seised of or entitled to not only the said freehold manor and estate of *Windlestone*

Volume XVIII.
1852.

WILSON
v.
EDEN.

(which comprises the whole township of *Windlestone*, and contains 1182 acres 2 roods 29 perches), but also two closes of freehold land immediately adjoining the said *Windlestone* estate, and situate in the township of *Counden*, and containing together about 16 acres, and the freehold tithes thereof: and also some detached portions of freehold lands in the said township of *Merrington*, and containing together about 106 acres; and the freehold tithes of parts of the said leasehold estates in *Merrington* and *Middlestone*; an estate in the township of *West Auckland*, chiefly freehold and copyhold, with the freehold tithes thereof; and two leases for lives, containing together 1162 acres or thereabouts; and freehold lands in the township of *Saint Helen's Auckland*, containing 381 acres or thereabouts; of two freehold fields, containing together about 19 acres, in the township of *Bondgate in Auckland*; and of a freehold messuage in the city of *Durham*: but which said freehold fields and messuage were afterwards sold by the testator in his lifetime.

The said freehold mansion and estate of *Windlestone* have been in the possession, and the residence, of the family of the said testator for upwards of one hundred years; and there are several cottages (some of which are ornamental) and other buildings standing upon that part of the said leasehold estates which is nearest the said mansion; and which buildings, consisting of three cottages called *Well Houses*, were, in the lifetime of the testator, occupied by persons employed about the said mansion and estate at *Windlestone*; and the said testator, during his life, expended upwards of 40,000*l.* in rebuilding or restoring the said mansion and premises.

On the 20th February 1845, *Eleanor Wilson*, one of

the sisters and next to kin of the said testator, filed her bill in the Court of Chancery against *John Eden*, the executor of the testator, and the said Sir *W. Eden* and others, praying (amongst other things) that it might be declared that the said testator died intestate as to his leasehold estates, and that an account might be taken of the same and of the rents and profits thereof, &c.

The case then stated that, on the cause being tried before the Master of the Rolls, his Lordship directed a case to be sent to this Court, submitting the following question for their opinion:

Whether the leasehold estates, of which the testator, Sir *Robert Johnson Eden*, died possessed, passed under the devise in his will of all and singular his manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes and hereditaments, situate, lying, and arising, or being at or near *Windlestone, West Auckland, St. Helen's Auckland, and Bishop's Auckland*, in the county of *Durham* or in the city of *Durham*, and *Brignal*, in the county of *York*, and all other his real estates in the said counties of *York* and *Durham*, and elsewhere in *Great Britain*, and all his estate and interest therein.

The will and codicils of the said testator were to form part of the case.

Sir *Fitzroy Kelly*, for the plaintiff. The question for the Court is, whether the leasehold estates passed to the trustees under the devise of the realty, or, as the plaintiff contends, to the testator's brother under the previous bequest of the personalty. That question raises three points: first, how the leaseholds would have passed before stat. 7 *W. 4 & 1 Vict. c. 26.*; secondly, whether, the will

*Queen's Bench
1852.*

*WILSON
v.
EDEN.*

Volume XVIII. having been revived and brought within the scope of 1852.

WILSON
v.
EDEN.

that Act, under sect. 34, by the codicil in 1841, the description of the realty in the will is such a description as is intended by sect. 26; thirdly, whether, if it be, the proviso in that section, with respect to a contrary intention appearing by the will, applies here.

As to the first point: it was laid down in *Rose v. Bartlett* (a) that, "if a man hath lands in fee and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only, and not the lease for years: and if a man hath a lease for years and no fee simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will should be merely void." And this rule has been recognized and acted upon up to the passing of stat. 7 W. 4 & 1 Vict. c. 26. The leaseholds in the present case, therefore, would not have passed, the testator having also freehold lands to which the description would apply. In *Thompson v. Lady Lawley* (b) the Court decided according to the rule laid down in *Rose v. Bartlett* (a). *Addis v. Clement* (c), *Lane v. Earl Stanhope* (d), *Day v. Trig* (e) and *Lorther v. Cavendish* (g) will probably be cited on the other side. But in all those cases, as *Heath* J., with reference to the two first, observed in *Thompson v. Lady Lawley* (h), there were special circumstances from which the intention of the testator that the personality should pass under the general devise could be collected. In *Addis v. Clement* (c) the testator devised all his lands which he was seized or "possessed of, or any ways interested in;" and this last

(a) *Cro. Car.* 292. (b) 2 *Bos. & P.* 303.

(c) 2 *P. Wms.* 456. (d) 6 *T. R.* 345.

(e) 1 *P. Wms.* 286. (g) *Amb.* 356. *S. C.*, more fully, 1 *Eden*, 99.

(h) 2 *Bos. & P.* 318.

description was held to refer to the leaseholds. In *Lane* *Queen's Bench*.
v. Lord Stanhope (*a*) and *Lowther v. Cavendish* (*b*) the
 word "farms," and the words "lands, tenements,"
 "mines" and "rents," were respectively held, in the
 particular cases, to indicate leasehold property. In
Day v. Trig (*c*), where the testator devised "all" his
 "freehold houses," he had none but leasehold pro-
 perty; so that the second part of the rule in *Rose v.*
Bartlett (*d*) applied. In the present case not only is
 there nothing, in this devise, to indicate an intention
 that the leaseholds should pass under it, but a marked
 separation and distinction is made, in the other parts
 of the will, between the two descriptions of pro-
 perty, which are settled in two different ways. *Arkell*
v. Fletcher (*e*) is directly in point for the plaintiff; and
Pistol v. Riccardson (*g*) is an authority to the same
 effect.

1852.
 WILSON
 v.
 EDEN.

As to the second point: stat. 7 *W.* 4 & 1 *Vict. c. 26. s. 26.*
 enacts that "a devise of the land of the testator, or of
 the land of the testator in any place or in the occupation
 of any person mentioned in his will, or otherwise
 described in a general manner, and any other general
 devise which would describe a customary, copyhold, or
 leasehold estate if the testator had no freehold estate
 which could be described by it, shall be construed to
 include the customary, copyhold, and leasehold estates
 of the testator, or his customary, copyhold, and leasehold
 estates, or any of them, to which such description shall
 extend, as the case may be, as well as freehold estates,

(*a*) 6 *T. R.* 345.

(*b*) *Amb.* 356. *S. C.* 1 *Eden*, 99.

(*c*) 1 *P. Wms.* 286.

(*d*) *Cro. Car.* 292.

(*e*) 10 *Sim.* 299.

(*g*) 2 *P. Wms.* 459. (note (1)).

Volume XVIII. unless a contrary intention shall appear by the will." 1852.

WILSON
v.
EDEN.

But that section applies only to cases where there is but one general devise of the landed property, not where, in addition to such devise, the real property and the personal property are expressly left to different persons. Here, moreover, in the very devise in question, the words "and all *other* my *real* estates" &c. define the character of the property devised, and prevent the description from being such as would describe a leasehold estate if there were no freehold to which it was applicable. [Lord *Campbell* C. J. I do not think it is clear that the words "real estates" might not apply to leaseholds.]

As to the third point: the will itself clearly shews an intention that the leaseholds shall not pass under the general devise, and therefore the proviso at the end of sect. 26 applies. In the first place, the testator begins by leaving all his personal estate, after payment of his debts and funeral expences, to his brother, in terms so distinct and technical that they must rebut any inference of a contrary intention which might possibly be drawn from the terms of the subsequent devise. In *Davis v. Gibbs* (a) a distinct bequest of this kind was held to afford a strong presumption against such a construction of another part of the will as would alter the disposition of part of the personal property. The language of the will here shews that it was framed by some person thoroughly acquainted with the effect of legal phrases; and, if he had intended to pass the leaseholds under the devise of the realty, he would have used clear and unmistakeable words of conveyance to that effect.

Here, moreover, if the leaseholds were held to pass under the general devise, the consequence would be, that the first tenant in tail would take an estate tail in the freeholds, and would take the interest in the leaseholds absolutely. The words of limitation are clearly not intended to effect this. They are applicable to freehold property only. And the real estates are made subject to the payment of certain annuities, which is a strong argument that the freehold lands only are meant. Further, the situation of all the freehold estates is expressly described in the devise; but the leaseholds, which are in the parish of *Merrington*, and distinct from the freehold property at *Windlestone* and elsewhere, are not described at all. It is highly improbable that, if the testator had intended the leaseholds to pass with the other landed property, he would not have described them as explicitly as the other portions of his estates.

Queen's Bench.
1852.

WILSON
v.
EDEN.

Malins, contra, was not called on.

Lord CAMPBELL C. J. I have read most carefully the case submitted to us, as well as the judgment of Lord *Langdale* (*a*) and of the Court of Exchequer (*b*); and I have heard with great pleasure the able argument on behalf of the plaintiff: but, as we entertain no doubt as to the construction of the will, I do not think it is necessary that we should hear the argument on the other side.

I concur entirely in the decision of the Court of Exchequer, and in the reasons which are given by

(*a*) See *Wilson v. Eden* 11 *Beav.* 237. 247.

(*b*) See *Wilson v. Eden*, 5 *Exch.* 752. 765.

Volume XVIII. them for that decision. I express no opinion as to
1852. what would have been the effect of the devise in ques-

WILSON
v.
EDEN.

tion before the passing of stat. 7 W. 4 & 1 Vict. c. 26.; but I am clearly of opinion, though with most sincere respect for the judgment of Lord *Langdale*, that, under sect. 26 of that Act, the leaseholds pass under the general devise of the realty. That section enacts "that a devise of the land of the testator, or of the land of the testator in any place or in the occupation &c." (His Lordship here read the whole clause, for which see p. 483, antè.) Now here we have a devise of the land of the testator, in a place, most distinctly set out. He devises all "my manors or lordships, rectories, advowsons, mes-
usages, lands, tenements, tithes and hereditaments, situate, lying, arising or being at or near *Windlestone*, *West Auckland*, *St. Helen's Auckland*, and *Bishop's Auckland*, in the county of *Durham* or in the city of *Durham*, and *Brignal*, in the county of *York*, and a parcel of land purchased by me of the late Mrs. *Mary Lambton* at *Romanby*, near *North Allerton*, in the North Riding of the county of *York*." It seems admitted that, if this had been the whole demise, it would have come within the operation of sect. 26. Then is it, as has been contended, taken out of the operation of that section by the subsequent words "and all other my real estates in the said counties of *Durham* and *York*, and elsewhere in *Great Britain*, and all my estate and interest therein"? I cannot see how this latter part of this devise affects in any way the first part, or prevents it from being a devise of the lands of the testator in a particular place.

But it is further contended, that the leaseholds do

XV. VICTORIA.

not pass under this devise, because a contrary intention appears by the will. Now, in examining whether there be such a contrary intention, I consider that we are not to look to any technicalities, but to form our conclusion from the general language of the will, looking at all such facts as may fairly be taken into consideration in construing it. Before the passing of stat. 7 *W. 4 & 1 Vict. c. 26.* the leaseholds would not have passed under such a devise as this, unless the will shewed elsewhere a clear intention that they should do so; but, since the Act, a contrary intention must be positively shewn, in order to prevent them from so passing. I can see no such contrary intention here. I think the testator clearly did intend that the leaseholds should pass. There is no incompatibility in this; for the leaseholds had been long in the possession of the same family, and were probably considered to form part of one and the same estate with the freeholds. It has been argued that great inconvenience would result from the first tenant in tail taking an absolute interest in the leasehold; but he takes, substantially, the same interest in the freeholds; for he has only to execute a disentailing deed to acquire precisely the same interest in those. The argument for the plaintiff has failed to convince me that there is anything in the will to indicate an intention that the leaseholds should not pass with the freeholds; and, that being so, I am of opinion that, under stat. 7 *W. 4 & 1 Vict. c. 26. s. 26.*, they do so pass.

ERLE J. I also have considered the judgment of the Court of Exchequer, and am perfectly satisfied with it. I am clearly of opinion that this devise is capable,

Queen's
185:

WILS
v.
EDR

~~Volume XVIII.~~ under sect. 26 of stat. 7 W. 4 & 1 Vict. c. 26., of
1852.

~~Wilson~~
~~v.~~
~~Eccles.~~

passing chattels real as well as freeholds. The leaseholds in question, therefore, will pass, unless a contrary intention appears by the will. I cannot find any such intention; and, looking at the facts which may be taken into consideration in construing the will, I am of opinion that the testator did intend that the leaseholds should pass with the freeholds. The contiguity of the former to the latter; the unity of occupation; the fact that part of the leaseholds was let together with the freehold, that part was used for the purpose of ornamenting the mansion, which stood upon the freehold property, and that part was occupied by retainers employed upon the freehold; all these circumstances produce a conviction in my mind that the leaseholds and the freeholds were considered by the testator as one estate, and that he intended that both descriptions of property should pass together. It has been argued that the form in which the real estate is settled is inapplicable to leaseholds. No doubt it is, technically speaking: but, although we may assume, as has been suggested, that the framer of the will must have been aware that leaseholds are classed in law under personalty, it does not follow that the testator adopted that knowledge, or that either of them considered the property in question to be leasehold; they may both have thought that all the estates were held by the same tenure, and have drawn and executed the will in accordance with that view. At all events, I do not think that the argument founded on the supposed legal knowledge of the framer of the will at all countervails that inference of the testator's intention which is to be drawn from the facts I have already mentioned; and

those facts countervail, in my opinion, any technical argument to the contrary as to the construction of the will. I am therefore of opinion that, under this devise, the leaseholds pass with the freeholds.

Queen's Bench.
1852.

WILSON
v.
EDEN.

CROMPTON J. I am of the same opinion. The onus lies upon the next of kin to prove that the will shews an intention on the part of the testator that the leaseholds should not pass under the devise of the realty. That intention, in my opinion, has not been shewn. We need not enter upon the question as to what would have been the effect of this devise before the passing of stat. 7 W. 4 & 1 Vict. c. 26. The form of the limitations might then have been a strong argument against the leaseholds passing. But, since the Act, they will pass, unless a contrary intention is positively shewn. I am of opinion that the intention of the testator was that the leaseholds should pass with the freeholds, and that he considered the two as forming one estate. I think that the judgment of the Court of Exchequer is right; and that our certificate should be to the same effect as that which has already been sent by that Court (*a*).

The following certificate was afterwards sent.

"We have heard this case argued by counsel, and are of opinion that the leasehold estates of which the testator, Sir *Robert Johnson Eden*, died possessed, passed under the devise in his will of 'all and singular my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes and hereditaments, situate, lying, arising at or near *Windlestone, West*

(*a*) *Wightman J. was absent.*

davits (a) (by the clerk to the plaintiffs' attorney) stated: "That the acts of bankruptcy on which the said plaintiffs were respectively adjudged bankrupts were the quitting this country with intent, as it is alleged, to delay their creditors; and the sufficiency of the petitioning creditor's debt depends to a great extent upon the nature of the communications which passed between the said plaintiff *Saverio Castelli* and the petitioning creditors, or between him and one *Peter Pasquali*, as to the constitution and dissolution of a firm in which the plaintiffs had been partners down to the end of the year 1850; and the only persons who can give conclusive evidence upon these points are necessarily the said *Saverio Castelli* and *Giovanni Baptista Guistiniani* themselves: and that both the said plaintiffs are material and necessary witnesses in this action; and this deponent is advised and believes that it will not be safe to proceed to the trial of this action without the evidence of each of the said plaintiffs. And this deponent saith that the said plaintiff *S. Castelli* is now residing at *Constantinople*, and that the said plaintiff *G. B. Giustiniani* is now at *Leghorn*, where he resides and carries on his business: and this deponent believes that neither the said *S. Castelli* nor the said *G. B. Giustiniani* will be in *London* in time to attend the trial of this cause. And this deponent saith that this application is made bonâ fide and not with intent to delay the trial."

Application was made for commissions as above to *Crompton J.* at chambers, on *February 23d* in this year. The learned Judge declined making the order; but, for the purpose of giving the plaintiffs time to arrive

(a) Sworn 13th *February 1852*. The averments as to the residence of the plaintiffs, the materiality of their evidence, and the belief that they would not be in *England* in time for the trial, were repeated in an affidavit of *April 16th*.

Queen's Bench.
1852.

CASTELLI
v.
GROOM.

Volume XVIII. in *England*, he directed the venue to be changed from 1852.

CASTELLI
v.
GROOM.

Surrey to *London*, and the cause to be tried by a special jury at the first sittings in the then next *Easter* term. No specific reason, except the distance of residence, was assigned for the non-attendance of the plaintiffs: but a letter from their attorneys to those of the defendant, set forth on affidavit, had these words: "It appears to us very unreasonable to expect that parties abroad, against whom proceedings of this nature are taken, are to be deprived of redress and of the means of vindicating themselves in the Courts of this country unless they consent to come within the reach of the very parties whose hostile proceedings have given rise to the mischief of which they complain. It would amount to a denial of justice in the present case if the plaintiffs' evidence is to be excluded unless they personally appear at the trial." By an affidavit in opposition to the present rule, the defendant's attorney and one of the petitioning creditors stated their belief that there was no ground for the action, or for disputing the adjudication; "that it will not be safe for the defendant to go to trial in this cause upon any evidence to be given by the said plaintiffs unless the same be taken in court in the presence of the jury and subject to cross examination; and that the said plaintiffs have no reasonable excuse, to the knowledge or belief of these deponents, for not personally attending the trial of this cause, nor anything to prevent them from so attending save their fear of being molested under their bankruptcy, which they are contesting." One of the deponents stated that *Castelli* had absconded from *London*, where he had a place of business, after being served with a notice in bankruptcy on deponent's behalf, and for no purpose, as deponent believed, but to avoid proceedings threatened

by his creditors: and both swore that they believed the present application to have been made for delay only, and not bona fide.

Queen's Bench.
1852.

CASTELLI
v.
GROOM.

Bramwell and *Karslake* now shewed cause. Conceding, for the sake of argument, that the Court can grant a commission to examine parties, like other witnesses, a reason ought to be shewn for such examination, which is a departure from ordinary practice. [Lord *Campbell* C. J. I should say that the rule as to examining on interrogatories ought to be general: but it would be very inconvenient if persons could bring actions, and then go abroad to avoid being examined in Court.] No ground appears on affidavit for the course proposed, except that the plaintiffs are absent, and would be inconvenienced by having to attend. It may be inferred from the observations of *Wightman* J. in *Carruthers v. Graham* (a) that reasons of this kind will not induce the Court to order an examination on interrogatories where the witness might be questioned *vivâ voce*. Any difficulty from the length of time which would be requisite to enable these parties to attend was removed by the order at chambers.

Willes, contrâ. No reason is shewn on affidavit against the proposed examination. [Lord *Campbell* C. J. The onus lies on you, of shewing that the commission is necessary to the due administration of justice.] The Court ought to allow such a proceeding, if the parties have not disentitled themselves to it. [Lord *Campbell* C. J. Is it enough to shew simply that the person is out of the jurisdiction of the Court; at

(a) 9 DowL P. C. 947.

Volume XVIII. *Boulogne* for instance ?] When the Act, 1 W. 4. c. 22., 1852.

CASTELLI
v.
GROOM.

enabling Courts to order examination upon interrogatories elsewhere than in *India*, passed, persons who had an interest could not have given evidence in any form; and for that reason parties could not have been examined on interrogatories. *Worrall v. Jones* (a), commented upon in 2 *Taylor on Evidence* 872 (b), shews that the exclusion would have rested on this and no other ground. But, since the disability of interested persons, and, finally, of parties themselves, has been removed, by stats. 3 & 4 W. 4. c. 42. s. 26., 6 & 7 Vict. c. 85. s. 1., and 14 & 15 Vict. c. 99. s. 2., parties, equally with any other persons, may be examined under stat. 1 W. 4. c. 22. s. 4.; and the enactment is of a class in which permissive words are deemed imperative, on the principle laid down in *Rex v. The Steward &c. of Havering atte Bower* (c). In *Dye v. Bennett* (d) (where the application was for a mandamus to examine witnesses at *Sydney*) *Wilde* C. J. said : “ *Prima facie*, the party is entitled to have his witnesses examined, wherever they may happen to reside. It is for the party objecting, to shew some ground of objection.” Alleged misconduct of the party to be examined (at least if it be not a misconduct touching the cause itself) is no ground of objection: and the allegations here, founded on the supposed bankruptcy, assume the very point which is in litigation.

Lord CAMPBELL C. J. I do not lay down as a general rule that there may not be a commission to

(a) 7 *Bing.* 395.

(b) 1st Ed., where *Pipe v. Steele*, 2 Q. B. 733., is also referred to.

(c) 5 *B. & Ald.* 691.

(d) 9 *Com. B.* 281.

examine parties abroad on their own behalf. But it lies upon them to shew that such a commission would be conducive to the due administration of justice : it is not enough to represent merely that they are living out of the jurisdiction of the Court. If an examination abroad were granted on such terms, the mischief evidently follows, that recourse would constantly be had to this practice by parties commencing suits and not wishing to be examined in Court. Nothing more would be necessary in such a case than to sail across the Channel. The words "it shall be lawful" are often obligatory : but Mr. Willes contends only that the commission should be grantable if a *primâ facie* right is shewn : and he does not, I think, shew even a *primâ facie* right. It appears to me in this case not conducive to the due administration of justice that the party should not come into the witness box and be subject to cross examination.

Queen's Bench.
1852.

CASTELLI
v.
GROOM.

WIGHTMAN and ERLE Js. concurred.

CROMPTON J. The only doubt in my mind was, whether or not it was discretionary in the Court to grant a commission under the statute or refuse it. In the note (*h*) on stat. 1 W. 4. c. 22. in 1 *Chitty's Statutes*, 1121, 2d ed., it is said that the granting a commission is in the discretion of the Court; and *Duckett v. Williams* (*a*) is cited. Bayley B. says there: "The Act may not be obligatory, and the Court may exercise a discretion, to be regulated by the circumstances of each case, whether it will issue a commission." The words "it shall be lawful," in a statute, are obligatory or not, according to the subject matter. The object of this statute was

(*a*) 1 Cro. & J. 510. S. C. 1 Tyr. 502.

Volume XVIII. to give, through the medium of a Court of law, that
1852.
which otherwise could not have been obtained without
recourse to equity: and it must be construed according
to that intention.

CASTELLI
v.
GROOM.

Rule discharged.

Wednesday,
May 5th.

DOE, on the demise of LUCY MARY KING, *against*
GRAFTON.

Premises were let from 19th April, 1841, at the yearly rent of 42*l.* payable quarterly, the first payment, of 7*l.* 13*s.* 6*d.*, to be made on 24th June 1841, being the proportion down to that date; the tenant to hold and enjoy &c., at the said rent, until one of the said parties should give the other six calendar months' notice to quit; the tenant to leave the said premises in as good condition as at the date of the agreement.

Held, that notice might be given to quit at the expiration of any six months after June 24th: and that a notice on 24th June for 25th December, 1841, was good.

EJECTMENT for premises in *Chancery Lane* in the county of *Middlesex*. On the trial, before Lord Campbell C. J., at the *Westminster* sittings after last *Hilary Term*, the following agreement was proved, under which the defendant had held the premises as tenant of the lessor of the plaintiff.

"Memorandum of agreement made and entered into the 19th day of *April* 1841, between *Lucy Mary King, of* &c., "widow, of the one part, and *Henry Grafton, of* &c., "philosophical instrument maker, of the other part.

First, the said *L. M. King* agrees to let, and the said *H. Grafton* agrees to take, all that the ground floor and front room on the second floor of the dwelling house of the said *L. M. King*, situate in *Chancery Lane* aforesaid, and numbered 80, at the yearly rent of 42*l.* payable quarterly; the first payment, of 7*l.* 13*s.* 6*d.*, to be made on the 24th day of *June* next, being the proportion of rent from the 19th of *April* 1841 to that date. And it is hereby further agreed that the said *H. Grafton* shall and may hold and enjoy the said ground floor and room

at the said rent, free from all rates and taxes, until one of the said parties shall give unto the other six calendar months' notice in writing to quit at the expiration of any such notice the said *Henry Grafton* shall and will leave the said premises with the fixtures thereon in as good state and condition as the same now are. And it is also agreed" &c. (no alteration to be made in the premises without the consent of *L. M. King*, nor the shop used for any other business than that of a philosophical instrument maker; and *Grafton* to have the use of certain fixtures, which were scheduled, so long as he should occupy &c.). "As witness the hands of the parties hereto, the day and year first above written.

Lucy King."

The lessor of the plaintiff gave notice on the 24th *June*, 1851, to quit on 25th *December* following. For the defendant it was urged that a notice ought to have been given expiring on the 19th of *April*, or, if not, then on the 24th of *June*. The Lord Chief Justice thought otherwise: and the jury, under his Lordship's direction, found a verdict for the plaintiff.

Warren, in this term (*April* 17th), moved for a new trial on the ground of misdirection. He cited several authorities (discussed afterwards on argument upon the motion); and (*April* 20th) a rule *Nisi* was granted.

G. Hayes now shewed cause. Where an agreement is made generally, to quit at half a year's or a quarter's notice, the half year or quarter must end with an entire year of the tenancy; *Doe dem Pitcher v. Donovan*(a). But here the parties have made a special agreement (not orally as in that case, but in writing) by which

(a) 1 *Taunt.*, 555. *S. C. at Nisi Prius*, 2 *Camp.* 78.

Queen's Bench.
1852.

Doe dem.
KING
v.
GRAFTON.

Volume XVIII. the first payment of rent (for part of a quarter) was
1852.

Doe dem.
KING
v.
GRAFTON.

to be made on 24th *June*, and the defendant was to hold, at 42*l.* a year, payable quarterly, until one party should give the other six months' notice to quit; and the defendant undertook to quit at the expiration of "any such" notice. The starting point is 24th *June*; the rent for the broken period preceding was calculated, and was to be paid off on that day; and the defendant then commenced a holding which was determinable by six months' notice from any quarter day. The half year's notice might have been given on the first *Michaelmas* day. If this was not so, a tenancy from year to year must have been contemplated; but the parties have not used any words expressing such an intention: and the special habendum clearly implies a different one. The case is not so strong in favour of a yearly taking as *Wilson v. Abbott* (*a*), where a half yearly rent was paid, but the Court did not consider the tenancy as extending from year to year. In *Kemp v. Derrett* (*b*) the agreement was that the tenant should "always" "be subject to quit at three months' notice:" and Lord *Ellenborough* held this to be a tenancy from three months to three months, reckoned from the day of entry, determinable by notice ending with any such period of three months. There, "always" "subject to quit" could not have meant subject to quit only at one particular quarter day: a similar remark applies here to the words "at the expiration of any such notice." *Chambre J.* observed, in *Doe dem. Pitcher v. Donovan* (*c*), that, "if it was a tenancy from year to year, with a quarter's warning, it would be a quarter ending with the year: but if it were a demise for one year only, and then to

(*a*) 3 *B. & C.* 88.

(*b*) 3 *Camp.* 510.

(*c*) 1 *Taunt.* 557.

continue tenant afterwards, and quit at a quarter's notice, it would be a quarter ending at any time." In *Brown v. Burtenshaw* (*a*), cited on the motion for this rule, it was not decided whether the three months' notice, ending within the year, was good or not; *Bayley* J. thought it doubtful in the particular case, though he admitted that such a notice might be good by usage: and the Court thought another trial desirable.

*Queen's Ben.
1852.*

Doe dem.
KING
v.
GRAFTON

Warren, contrà. A yearly tenancy was constituted in this case, according to *Doe dem. Pitcher v. Donovan* (*b*). The agreement is to take "at the yearly rent of 42*l*, payable quarterly." [Lord *Campbell* C. J. That may be only the mode of computing the rent.] A general hiring of a servant at so much a year is a yearly hiring. "Payable quarterly" merely denotes the time of payment. Six calendar months' notice is the usual term in a yearly tenancy. The words "at the expiration of any such notice," properly read, begin a sentence, which has reference to the giving up of the premises and fixtures in good condition: it is immaterial to this head of the agreement what the time of notice was: the stipulation is, in substance, that, whichever party gives notice, the tenant shall be bound to deliver up everything in the condition bargained for. Some difficulty arises from the entry in the middle of a quarter; but, in any view of the case, notice for 25th *December* cannot be correct. In *Doe dem. Cornwall v. Matthews* (*c*) the tenant entered on *May* 7th, 1850, on an agreement, at a rent payable quarterly. No rent was ever paid. It was contended that the tenancy must run from *June* 24th, 1850; and

(*a*) 7 *Dowl. & R.* 603.

(*b*) 1 *Taunt.* 555.

(*c*) 11 *Com. B.* 675.

Volume XVIII. *Doe dem. Holcomb v. Johnson (a)* and *Doe dem. Savage 1852.*

*Doe dem.
KING
v.
GRAFTON.*

v. *Stapleton (b)* were cited: but the Court of Common Pleas held that the tenancy was properly determined by a notice ending *May 7th, 1851*. In *Doe dem. Wadmore v. Selwyn (c)*, where the tenant entered during a quarter, agreeing to pay rent "quarterly and for the half quarter," it was left to the jury whether the tenant held from the quarter day before, or the quarter day after he entered; and the jury, under Lord *Ellenborough's* direction, found "that the tenancy commenced with the preceding quarter." [*Wightman J.* The notice here must stand on the express stipulation, if there be one, to quit at any six months; otherwise there is no view which can support it.] The language of Lord *Kenyon* in *Shirley v. Newman (d)* supports the principle relied on by the defendant, though an exception is there allowed in the case where a notice, other than the ordinary one, is acquiesced in. In *Kemp v. Derrett (e)* there was a peculiar expression, not used here, that the tenant should "always" be subject to quit at three months' notice. There is no indication on the face of this agreement that less than a year's holding was contemplated: it was not necessary to make an express provision for a six months' notice. The mention of six months' notice, and of the "expiration of any such notice," refers only to the usual incident of a yearly holding, which both parties must be supposed to have known.

Lord CAMPBELL C. J. This notice was sufficient.

(a) 6 *Esp. N. P. C.* 10.

(b) 3 *Car. & P.* 275.

(c) *Adams on Ejectment*, 107. 4th ed.

(d) 1 *Esp. N. P. C.* 266.

(e) 3 *Camp.* 510.

Queen's Bench.
1852.

Doe dem.
KING
v.
GRAFTON.

Looking to the agreement, I think there is no doubt of the intention, and that neither party had a notion of creating a tenancy which might not be determined by a six months' notice, as here given. If there had been any case supporting a different construction, I should have felt bound by it: but there is none which seems at all to controvert the conclusion that a notice for the 25th of *December* was sufficient according to the intention of the parties. It is, no doubt, true that, on an ordinary yearly letting, the six months' notice must expire at the end of the year. But here no words appear which make such a construction necessary. The word "yearly" is only a word of calculation; the payment is to be at the rate of a yearly rent of 42*l*. The first payment is to be for the period from 19th *April* to 24th *June*, being the proportion of rent to that date: there is nothing in that: then comes the regular habendum: and then "until one of the said parties shall give unto the other six calendar months' notice in writing to quit." That indicates the term; which is not to be less than six months, and not necessarily longer. Therefore the onus which rested upon Mr. *Warren* in this case has not been sustained: the tenancy is not shewn to have been yearly; and, if it was not, there was no need that the notice should expire at the period when the tenancy commenced. In *Doe dem. Pitcher v. Donovan* (a) there was nothing to indicate that the notice was not meant to expire on the day when the tenancy began. Here, it is expressly agreed that the first payment shall be on the 24th of *June* for the rent due from *April* 19th; that the other payments shall be quarterly; and that the tenant shall hold until one

Volume XVIII. party shall give the other six months' notice. And that
 1852. notice was given on the 24th of *June*.

Doe dem.

KING

v.
GRAFTON.

WIGHTMAN J. Every case of an express agreement, as this was, must be decided on its own terms. "At the yearly rent of 42*l*. payable quarterly," would indicate a yearly tenancy; but what follows is inconsistent with this: provision is made for paying the portion of a quarter, to 24th *June*; and it is then added: "until one of the said parties shall give unto the other six calendar months' notice." These are the effective words, and decide the construction of the agreement.

ERLE J. The authorities determine that, where premises are taken on a yearly tenancy, the term must expire with the year. But that is so only where the hiring is for a year; and in this case the presumption of a yearly taking which might result from the mention of a yearly rent is rebutted by the words which follow.

CROMPTON J. There is no doubt that a holding was commenced from the 24th of *June*, which would, *prima facie*, be a yearly one: but it is cut down by the subsequent words allowing either party to determine it by a notice at six months, which may not be the six months usually contemplated under a yearly holding.

Rule discharged (a).

(a) See *Tress v. Savage*, 4 *E. & B.* 37.

Friday,
May 7th.

The QUEEN *against* FLETCHER.

Reported, 2 *E. & B.* 279.

Queen's Bench.
1852.

JAMES HENRY LEWIS *against* NICHOLSON and
PARKER.

Friday,
May 7th.

DECLARATION stated that Messrs. *Arless & Tucker* had assigned by bill of sale to plaintiff by way of security for 268*l. 7s.* certain goods; and that whilst the debt was unsatisfied *Arless & Tucker* became bankrupts. That the goods were seized by their assignees, who were about to sell them; and plaintiff gave notice that he claimed the goods and would forbid the sale. That, in consideration plaintiff would consent to the sale, defendants promised that the net proceeds of the effects included in the bill of sale should be paid to plaintiff to the extent of the balance then due to him. Averments of consent by plaintiff, and that the sale took place. Breach, that the net proceeds were not paid to plaintiff. There were also counts for money had and received, and on accounts stated.

Plea: Non assumpserunt. Issue thereon.

On the trial, before Lord *Campbell C.J.*, at *Guildhall*, at the sittings after last *Hilary Term*, the material facts appeared to be that the defendants were solicitors to the

Assumpsit on a promise that, if the assignees of a bankrupt would permit the sale of his goods, defendants would pay plaintiff the net proceeds to the amount of his debt secured on such goods.

Plea: Non assumpserunt. On the trial it was proved that defendants, being solicitors to the assignees, wrote to plaintiff's solicitor,

saying, "In consideration of" plaintiff's "consenting to the sale" "we hereby, on behalf of the assignees, consent that the net proceeds" shall be paid to plaintiff.

This offer was

accepted; the goods were sold; but the net proceeds were not paid over. The letter was written by the authority of the trade assignee, but not known to nor ratified by the official assignee. Other subsequent letters were in evidence. Nonsuit with leave to move.

Held: that subsequent letters were not admissible to aid in construing the contract in the first letter. That, on the true construction of the letter, defendants did not contract themselves, but made the contract for the assignees: that the trade assignee had no authority to bind the official assignee personally: but that this absence of authority did not make defendants liable on the contract as principals; and that the nonsuit was right.

Semblé: that in such cases there is an implied undertaking by the professed agent that he has the authority he professes to have.

Volume XVIII. assignees of Messrs. *Arless & Tucker*, who had become bankrupts. The trade assignee had ordered a sale by auction of goods seized as the property of the bankrupts, when the plaintiff's solicitor gave notice that the plaintiff claimed part of the goods under a bill of sale by way of mortgage. The following letters were then proved.

Defendants to plaintiff's solicitor, 26th *August* 1851.

"Re *Arliss and Tucker*. Sir, In consideration of Mr. *James Henry Lewis*, for whom you act, consenting to the sale, by Messrs. *Lewis & Son*, of the bankrupts' printing materials and other effects (part whereof is included in a bill of sale to Mr. *J. H. Lewis* by way of mortgage, dated the 16th of *March* 1850), we hereby, on behalf of the assignees, consent that the net proceeds of the effects included in the said bill of sale shall be paid over to you or your client to the extent of the balance now remaining due under the bill of sale for principal and interest. We shall feel obliged by your sending us immediately a consent to the sale accordingly. Yours faithfully, *Nicholson & Parker*."

Plaintiff's solicitor to defendants, 27th *August* 1851.

"Re *Arliss and Tucker*. Dear Sirs, In compliance with the undertaking given by you herein, and contained in your letter of the 26th instant, I hereby, on the part of Mr. *James Henry Lewis*, consent to the sale by Messrs. *Lewis & Son* of the bankrupts' printing materials and other effects (part of which is included in the bill of sale to Mr. *J. H. Lewis* by way of mortgage, dated the 16th of *March* 1850). I am, Gentlemen, Your obedient servant, *J. H. F. Lewis*, Solicitor to the said *J. H. Lewis*."

The sale took place accordingly. The trade assignee of the bankrupts had authorized the writing of the letter

of 26th *August* 1851. The official assignee was absent at the time, and did not know of the writing of that letter till afterwards; he was called as a witness for the plaintiff, and proved that he never ratified the contract in that letter.

Some letters written after the dispute had arisen were put in evidence, which, as plaintiff contended, shewed that defendants considered themselves as personally bound by the undertaking of 26th *August*.

The Lord Chief Justice directed a nonsuit, with leave to move to enter a verdict if the Court should be of opinion that, on the documents and evidence, the plaintiff was entitled to recover.

Shee Serjt., in the ensuing term, obtained a rule *Nisi* accordingly.

Bramwell and *Willes* now shewed cause. The plaintiff claims to be entitled to a verdict on two grounds: 1., that the written contract was in such terms as to amount to a personal undertaking by the defendants: 2., supposing the written contract to be made with the assignees, through the agency of the defendants, that there was no authority in fact, and therefore in law the defendants are liable as principals. The defendants deny all these propositions. In construing the letter of 26th *August*, it is material to observe that the promise is to do a thing which the writers' clients, the assignees, could perform, but which, without their consent, the writers could not; that it is in consideration of the client of the person to whom it is addressed consenting to a matter beneficial to the assignees and in which the writers had no interest; and that, though the promise is in some degree worded in

Queen's Ben
1852.

LEWIS
v.
NICHOLSON

Volume XVIII. the first person, it is qualified by saying the promise is
1852.

*Lewis
v.
Nicholson.*

the plaintiff's solicitor, who was clearly not making a personal contract, uses the same form of speech. "In compliance with the undertaking given by you herein, and contained in your letter of the 26th instant, I hereby, on the part of Mr. *James Henry Lewis*, consent." These two letters form the contract; the whole question of construction is whether at the time when these words were written, applying them to the facts, the intention appears to have been to make a contract between the solicitors or between the clients. It cannot be expected that any case should be found in which the contract has been in words closely resembling the present; but the reasoning of the judgment of the Court of Exchequer Chamber in *Downman v. Williams* (*a*) seems very applicable, and shews that this is not a personal contract. *Burrell v. Jones* (*b*) will be cited on the other side: but there the words were "We, as solicitors" &c., "do hereby undertake to pay." These words import a personal undertaking; and there was nothing in the fact that they were solicitors to shew that there was no intention to undertake so. In *Appleton v. Binks* (*c*), and in *Hall v. Ashurst* (*d*), contracts, expressed to be on behalf of others, were construed to be personal; but that was because on the face of the instrument it appeared that they could not operate otherwise: in *Appleton v. Binks* (*c*) because the instrument was under seal, and not sealed by the principal; and in *Hall v. Ashurst* (*d*) because the "London creditors," on

(*a*) 7 Q. B. 103. Reversing, in part, the judgment of Q. B. in *Jones v. Downman*, 4 Q. B. 235., note (*a*).

(*b*) 3 B. & Ald. 47.

(*c*) 5 East, 148.

(*d*) 1 C. & M. 714. S. C. 3 Tyr. 420.

whose behalf the defendant made the contract, were not a body with whom it could be intended to make a contract. That is the ground of Lord *Lyndhurst's* judgment.

Queen's Bench.
1852.

*Lewis
v.
Nicholson.*

Then as to the second point. The trade assignee authorized this contract; he as trade assignee had general authority over the estate of the bankrupts; and the official assignee, having left him alone in the management, must be taken impliedly to have given him authority to act for him. [Lord *Campbell* C. J. Probably he gave him that authority as to selling the estate: but you must go so far as to shew that the trade assignee had authority to bind the official assignee personally by a collateral contract.] Supposing that in fact he was not bound, that does not make the defendants liable as principals. If they had acted *malâ fide*, there can be no doubt that they would be liable in tort for deceit. Perhaps they are liable on an implied *assumpsit* that they had authority to bind the assignees; but they are not principals; *Jenkins v. Hutchinson* (*a*). The declaration in this case is that *defendants promised* to pay. The proof is that defendants asserted or, at most, promised that *the assignees promised* to pay. The measure of the damage for not paying a sum of money, if there was a contract to pay it, is the sum of money. The measure of the damage for not having authority to contract for a principal is the value of the recourse to that principal, and may be nominal.

Shee Serjt. and *Macnamara*, in support of the rule. The defendants contracted as principals. The letters of

(*a*) 13 Q. B. 744.

Volume XVIII. 26th and 27th *August* are ambiguous, and may be
1852.

LEWIS
v.
NICHOLSON.

explained by the subsequent acts and letters of the parties; *Harper v. Williams* (*a*), *Downman v. Williams* (*b*). [Erle J. In *Downman v. Williams* (*b*) the Court looked at all the letters forming the contract in order to see what the contract was, and to the subsequent letters and acts to see whether there was authority to make it. But I do not think that in either that case or *Harper v. Williams* (*a*) they used subsequent admissions, whether in writing or not, to construe a written contract.] Taking the letters by themselves, they import a personal contract. In several cases besides *Hall v. Ashurst* (*c*) parties have been held personally liable on contracts expressed to be made "on behalf" of others. [*Crompton* J. referred to *Watson v. Murrel* (*d*).] There are also similar decisions in *Ex parte Bentley* (*e*), *Kennedy v. Gouveia* (*g*), *Norton v. Herron* (*h*).

But, supposing that the contract purports to be only made by defendants as agents, there was no real principal; for the trade assignee has not authority to throw a personal responsibility on the official assignee; *Ex parte Evans* (*i*), *Ex parte Young* (*k*), *Munk v. Clarke* (*l*). Then, not having a principal, the defendants are liable personally on the contract; *Jones v. Downman* (*m*), note to *Thomson v. Davenport* (*n*) in *Smith's Leading Cases* (*o*), *Kennedy v. Gouveia* (*p*). The recent case of

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| (<i>a</i>) 4 Q. B. 219. | (<i>b</i>) 7 Q. B. 103. |
| (<i>c</i>) 1 C. & M. 714. S. C. 3 Tyr. 420. | (<i>d</i>) 1 Car. & P. 307. |
| (<i>e</i>) 2 Deac. & Ch. 578. | (<i>g</i>) 3 Dowl. & Ry. 503. |
| (<i>h</i>) Ry. & M. 229. | (<i>i</i>) 3 Deac. & Ch. 470. |
| (<i>k</i>) 2 Deac. 240. | (<i>l</i>) 10 Bing. 102. |
| (<i>m</i>) 4 Q. B. 235. note (<i>a</i>). | (<i>n</i>) 9 B. & C. 78. |
| (<i>o</i>) 2 <i>Smith's Leading Cases</i> , 222, 223 a. (3d ed., by Keating & Willes). | |
| (<i>p</i>) Note (<i>a</i>) to <i>Thomas v. Hewes</i> , 2 C. & M. 530. See S. C. 4 Tyr. 335. 338. | |

Jenkins v. Hutchinson (a) may be supported on the ground that the contract was made as by the owner of a particular ship, which the defendant there was not.

Queen's Bench.
1852.

LEWIS
v.
NICHOLSON.

Lord CAMPBELL C. J. I am of opinion that the rule must be discharged. Looking at the two letters which constitute the contract, I think it appears on the face of them, that the defendants did not intend to make themselves personally liable on the contract, but to make a contract between the plaintiff and the assignees. It is quite clear that the plaintiff's solicitor, to whom the letter of 26th *August* was addressed, was not himself a contracting party, but was acting as agent, making a contract for the plaintiff: and I think that the true construction of the letters is that the defendants also were not contracting parties, but acting as agents for the assignees, making a contract for them, and, as I think, personally contracting that they had authority to make a contract binding the assignees. The letter expresses that, in consideration of the plaintiff consenting to the sale, "we hereby, *on behalf of the assignees*, consent." My brother *Shee* in effect asks us to read the contract as if the words *on behalf of the assignees* were not there; but they are there; and the nature of facts shews that they were meant to express a contract by the assignees; for it was the consent of the assignees to pay over the money that was material to the plaintiff. The answer refers to "the undertaking given by you herein, and contained in your letter." That however does not shew that it was understood by the writer to be a personal undertaking by the defendants, but merely refers to the undertaking as made in their letter, and by them. I

(a) 13 Q. B. 744.

Volume XVIII. think therefore that, looking at these two letters which
1852. form the contract, it appears to have been the intention
 of both parties that the consent should be that of the
 assignees, not that of the defendants. That being so, I
 am clearly of opinion that we cannot look to subsequent
 letters to aid us in construing the contract. It is always
 legitimate to look at all the coexisting circumstances,
 in order to apply the language, and so to construe the
 contract; but subsequent declarations shewing what the
 party supposed to be the effect of the contract are not
 admissible to construe it.

No authority on the construction of a contract can be precisely in point, unless the words of the contracts are the same: but it seems to me that the present contract resembles that in *Downman v. Williams* (*a*), which was held to be not a personal undertaking, but a declaration of agency on behalf of the principals. In *Burrell v. Jones* (*b*) there were no words to shew that the undertaking was on the behalf of any one. In *Hall v. Ashurst* (*c*) the undertaking was on behalf of the *London* creditors. And in *Watson v. Murrel* (*d*) the undertaking was on behalf of the parish. It could not reasonably be intended that the plaintiff should contract with such bodies; and therefore it was apparent on the face of the instrument that the contract must be intended to be personal; but in the present case there is nothing unreasonable in intending that the contract should be with the assignees.

Then the other point is to be considered. I think the facts raise it, as the trade assignee had no authority to make the official assignee personally liable on such a

(*a*) 7 Q. B. 103.

(*b*) 3 B. & Ald. 47.

(*c*) 1 C. & M. 714.

(*d*) 1 Car. & P. 307.

collateral contract. He might give assent, binding on both, to the disposal of the goods or money; but this goes much beyond such authority. So, the principals not being bound, the question arises whether the defendants are liable in this form of action. In the note to *Thomas v. Heves* (*a*) it is stated to have been said by *Bayley* B. that, "where an agent makes a contract in the name of his principal, and it turns out that the principal is not liable from the want of authority in the agent to make such contract, the agent is personally liable on the contract." That is a high authority; but I must dissent from it. It is clear that it cannot apply where the contract is peculiarly personal; otherwise this absurdity would follow, that, if *A.*, professing to have but not having authority from *B.*, made a contract that *B.* should marry *C.*, *C.* might sue *A.* for breach of promise of marriage, even though they were of the same sex. Perhaps this distinction would be enough to support the decision in *Jenkins v. Hutchinson* (*b*), as there the contract might be said to be peculiarly made with the owner of the ship, which the defendant was not; but I go further. I think in no case where it appears that a man did not intend to bind himself, but only to make a contract for a principal, can he be sued as principal, merely because there was no authority. He is liable, if there was any fraud, in an action for deceit, and, in my opinion, as at present advised, on an implied contract that he had authority, whether there was fraud or not. In either way he may be made liable for the damages occasioned by the absence of authority. But I think that to say he is liable as principal is to make

Queen's Bench.
1852.

LEWIS
v.
NICHOLSON.

(*a*) 2 C. & M. 519. 530. note (*e*). S. C. 4 Tyr. 335. 338.

(*b*) 13 Q. B. 744.

June XVIII. a contract, not to construe it. I think therefore that
1852. these defendants were liable, but not in this action;
LEWIS and that the nonsuit, therefore, was right.

Mr. HOLBORN.

WIGHTMAN J. I also think that the nonsuit was right. The declaration is on a contract by the defendants personally. The proof is that a contract was made by them "on behalf of the assignees," language which, I think, *prima facie* imports that they made the contract only as agents. But it is said that this language is ambiguous, and may be controlled by surrounding circumstances, or explained by other documents, so as to shew a personal liability. Now I think that, if we look only at the legitimate evidence of the contract, there is no ambiguity at all. It all depends on the two letters; these formed the complete contract; and no subsequent statements written or verbal can have any effect on the construction of the contract already complete. Taking the words of these letters, it seems to me that it plainly was the intention that the defendants should not be personally liable, but the assignees. *Jones v. Downman* (a) is relied on. There the defendant, a solicitor, signed a letter in which he used the language, "I undertake (on behalf of Messrs. *Esdaile and Co.*) to pay" your bill of charges. The Court below arrived at the conclusion that the defendant had no authority from his clients *Esdaile and Co.* to make such a contract to bind them, and that, as was said in the judgment, "the language of the instrument is such that, if the defendant really had no authority, he must be taken to have contracted in his own name and character." That decision was reviewed in error, and was reversed (b), on the

(a) 4 Q. B. 235. note (e). (b) *Downman v. Williams*, 7 Q. B. 103.

ground that the contract in its legal construction was "a contract entered into by an agent on behalf of his principal," and that the want of authority to make such a contract did not appear; so that the Court of error pronounced no opinion on the effect of the absence of authority. In the present case there was not authority to bind the assignees; that may be assumed. Then can the defendants, having made a contract expressed to be by them as agents only, be liable on it as principals? That raises the question discussed in *Jones v. Downman* (a). There, in the judgment, the Court quote the following passage from *Story's Commentaries on the Law of Agency*, p. 335. (4th ed. Boston 1851.) c. x. s. 264. "Wherever a party undertakes to do any act, as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person, with whom he is dealing for or on account of his principal." That may very well be admitted to be literally true, without its being an authority that he is liable as principal to fulfil the contract. I am strongly inclined to think that there is in such cases an implied undertaking by the agent that he has the authority to bind his principal which he assumes to have. Certainly, if there is fraud, he would be answerable personally in an action on the case; if there is such an implied undertaking, he is liable personally in an action of assumpsit whether there be fraud or not. In the note to *Thomas v. Hewes* (b), cited at the bar, *Bayley* B. is said to have laid down the general rule, that, where an agent makes a

Queen's Bench.
1852.

LEWIS
v.
NICHOLSON.

(a) 4 Q. B. 235. note (e).

(b) 2 C. & M. 530. note (e). S. C. 4 Tyr. 335. 338.

Volume XVIII. contract in the name of his principal, and it turns out
1852. that the principal is not liable from the want of authority

LEWIS
v.
NICHOLSON. in the agent to make such contract, the agent is per-
sonally liable on the contract. If *Bayley* B. really
meant, as he is understood to have done, that the man,
through contracting as agent, was liable personally as
principal, I must dissent from his doctrine. There is
no case in banc in our Courts in which such has been
the decision. In 2 *Smith's Leading Cases* (3d ed.)
223 a., in the note to *Thomson v. Davenport*(a), it is
stated that on this subject the decisions of the Courts
of *New York* conflict with those of the Courts of
Massachusetts and *Pennsylvania*. I agree with what is
stated to be the doctrine of the latter Courts. For
these reasons I think the rule should be discharged.

ERLE J. The first question is, what is the true
construction of this contract. Looking at the terms of
the instruments, and the circumstances under which
they were written, I think the construction is that the
defendants made a contract between the plaintiff and
the assignees, and signed it as agents of the assignees.
And I think that subsequent admissions, whether in
writing or not, are not to be taken into account by
us in construing the written instruments in which the
contract was contained.

I also think that the defendants had not the authority
of both assignees to make the contract. The question
therefore arises, Are they liable as principals on the
contract, though intending and expressing an intention
to act only as agents in making it? I think they are
not. I think that, in general, no contract is made by

the law contrary to the intention of the parties. The *Queen's Bench.*
definition of a contract is that it is the mutual intention
of the two parties. There is a class of what are called
implied contracts, such as the promise to pay money
had and received to the plaintiff's use: but, when it is
said that such a contract is implied contrary to the
intent of the person receiving the money, it is in truth
only a technical mode of naming the remedy which the
law gives against that wrongdoer. I know of no case
in which what is properly called a contract is made by
the law contrary to the intent of the parties.

1852.
LEWIS
v.
NICHOLSON.

CROMPTON J. I agree that the defendants had not authority to make the contract for both assignees. Taking the contract to be only a promise by the defendants as agents, it is necessary to decide what has long been a moot point at law, whether, if a person make a contract as agent only, but has really no authority to bind the supposed principal, he is personally liable as principal. Perhaps it was not necessary to determine that point in *Jenkins v. Hutchinson* (a), though I think it was there decided, and in my opinion well decided, that the personal liability does not arise. Before the decision of that case, the contrary had been laid down at Nisi prius, but never in banc. Now, after that case, and the present decision, it must be considered as the decided law, that the remedy against the person who professes to make such a contract, but has not authority, is either by an action for the deceit, alleging and proving the scienter, or probably on an implied contract that he had authority; but not by treating him as principal.

(a) 13 Q. B. 744.

Volume XVIII.
1852.

LEWIS
v.
NICHOLSON.

On the construction of the contract in this case I have had rather more doubt, as there are several cases in which solicitors have been held personally liable on undertakings for their clients. But on the whole I think the undertaking in this case more nearly resembles that in *Downman v. Williams* (*a*) than that in any other decided case. I therefore agree that the nonsuit was right.

Rule discharged (*b*).

(*a*) 7 Q. B. 103. See *Tanner v. Christian*, 4 E. & B. 591; *Leonard v. Robinson*, 5 E. & B. 125.

(*b*) Reported by *C. Blackburn*, Esq.

Friday,
May 7th.

FARROW and another, assignees &c., against
MAYES.

A. having commenced an action of debt in the Queen's Bench against *B.*, a trader, *B.* proposed that a Judge's order should be made for stay of proceedings upon payment of debt and costs, and sent to *A.* a summons for that purpose, upon which a consent was indorsed by *A.* A Judge's order was thereupon made, at the instance of *B.*, directing proceedings to be stayed on payment of debt and costs; in default of payment, judgment to be signed and execution to issue. *B.* served a copy of this order on *A.* Neither the original order, nor any copy of it, was filed with the clerk of the docquets and judgments in the Queen's Bench, as directed by stat. 12 & 13 Vict. c. 106. s. 137. Judgment was signed, and execution taken out, under the order: and the sheriff paid to *A.*, from proceeds of the sale of certain goods of *B.*, the debt and costs for which execution had issued. After the execution and payment, *B.* became bankrupt.

Held that, under stat. 12 & 13 Vict. c. 106. s. 137., the order, judgment and execution were void as against *B.*'s assignees, the order not having been filed; and that the assignees might recover from *A.* the amount paid him under the execution, as money had and received to their use as assignees.

DECLARATION, by plaintiffs as assignees of *Edward Steward*, a bankrupt, contained three sets of counts. The first set was for money had and received by the defendant to the use of the said *E. Steward* before he became a bankrupt, and on an account stated between the defendant and the said *E. S.*, before he became a bankrupt; alleging a promise by

defendant to the said *E. S.* before the bankruptcy. The second set of counts was similar to the first, but alleged a promise by defendant, after the bankruptcy, to the plaintiffs as assignees. The third set was for money had and received to the use of the plaintiffs as assignees, and on an account stated between defendant and the plaintiffs as assignees, with a promise by defendant to the plaintiffs as assignees. Plea, Non assumpsit. Issue thereon. A case was stated for the opinion of this Court, by the order of *Coleridge* J. It was substantially as follows.

Queen's Bench.
1852.

FARROW
v.
MAYES.

The plaintiffs are the assignees of *Edward Steward*, a bankrupt, lately a farmer and corn merchant in *Norfolk*, who, on 2nd *February* 1850, was adjudged bankrupt, on the petition of the present plaintiff *Thomas Farrow*. The petitioning creditor's debt, the trading, and an act of bankruptcy committed on 25th *January* 1850, were duly proved. On 21st *February* 1850, the present plaintiffs were duly appointed assignees.

The present action was brought by the assignees to recover back a sum of 96*l. 6d.* received by the now defendant under an execution against the bankrupt's goods, upon a judgment recovered in an action brought by the now defendant against the bankrupt, and signed and entered up by virtue of a Judge's order made in the said action, but which order had not, neither had any copy of it, been, nor has the said order, or any copy of it, ever been, filed with the officer acting as clerk of the docquets and judgments in this Court. The circumstances under which the said order was made were as follows. The bankrupt, *Steward*, being indebted to the now defendant, *John Mayes*, in the sum of 75*l.*, the said *J. Mayes*, on 2nd *October* 1849,

Volume XVIII. brought an action of debt for recovery of the said sum in 1852.

FARROW

v.

MAYES.

brought an action of debt for recovery of the said sum in this court, against *Steward*, and, on 8th November 1849, delivered a declaration, to which *Steward* pleaded. On 19th November issue was joined, and notice of trial given. On 26th November 1849 *Steward's* attorney called on the attorney for *Mayes*, and proposed giving a Judge's order for stay of proceedings on payment of the debt and costs on the 1st January then next, which was refused. On 28th November 1849 *Steward's* attorney again called on *Mayes's* attorney, and offered a Judge's order for stay of proceedings, on payment of debt and costs on 12th December then next, to which *Mayes's* attorney agreed, and instructed his London agent accordingly. On 7th December the town agent of *Mayes* received from the town agent of *Steward's* attorney a summons to stay in conformity with the above arrangement, and indorsed a consent to stay, on payment, on or before 12th December 1849, of 75*l.* and costs as between attorney and client. The town agent of *Steward's* attorney objected to the payment of costs as between attorney and client, and refused to draw up the order; and *Mayes's* attorney, on 11th December 1849, took out a summons to shew cause why the cause should not be set down for the adjournment day, and the record resealed, and why *Steward* should not pay the costs of the application. This summons was served, and attended before *Patteson* J., who indorsed thereon the following memorandum. "Order: unless an order staying on payment of debt and costs on the 16th be served to day: costs of the application to be costs in the cause. J. P. Dec. 12th." *Steward's* attorney elected to draw up the order to stay, and did draw it up accordingly, upon the con-

sent originally given by the plaintiff's agent, except *Queen's Bench.*
that the time of payment was, by the plaintiff's agent,
altered in the said consent from the 12th to the 16th
December. The following is a copy of it. *1852.*

FARROW
v.
MAYES.

"*Mayes v. Steward.* Upon hearing the attorneys or agents on both sides, and by consent, I do order that, upon payment of 75*l.*, the debt due from the defendant to the plaintiff, for which this action is brought, together with costs, to be taxed and paid on or before the 16th of *December* next, all further proceedings in this cause be stayed. And I further order that, in case default be made in payment as aforesaid, the plaintiff be at liberty to sign final judgment and issue execution for the amount, with costs of judgment and execution, sheriff's poundage, officer's fees, and all other incidental expences, whether by fieri facias or capias ad satisfaciendum. Dated the 12th day of *December* 1849.

J. Patteson."

The summons to stay, with the consent originally indorsed thereon, were filed with the Judge's clerk, on the order being drawn up, in the usual manner; but *Steward's* agent served a copy of the order of 12th *December* on *Mayes's* agent on the same day when it was drawn up, and retained the possession of the original until 18th *December* following, when he lent it to *Mayes's* attorney for the purpose of taxing the costs and obtaining the Master's allocatur and signing judgment thereon if necessary.

Neither the said order of 12th *December* 1849, nor any copy of it, has ever been filed with the clerk of the docquets and judgments in the Queen's Bench, under sect. 137 of "The Bankrupt Law Consolidation Act, 1849." Default having been made in payment of the said debt and costs, judgment was, on 18th

*Volume XVIII
1552.*

FARROW
v.
MAYES

*December 1849, signed and entered up for 75*l* debt and 19*l*. 9*d*. costs. Upon that judgment so signed and entered up, a writ of *testatum si. fa.* was, on 19th December 1849, issued and lodged with the sheriff of Norfolk.*

The sheriff, on 20th December 1849, caused certain goods of the bankrupt to be taken in execution. On 22nd December 1849, a brother of the bankrupt paid the amount of execution and expences thereon; and the sheriff's officer gave up the goods to him, with a receipt for the sum paid. No sale by auction of the goods took place; nor was any bill of sale executed by the sheriff. The sheriff, by his said officer, on 27th December 1849, paid to the now defendant, *Mayes*, out of the money so received, the sum of 96*l*. 6*d*. (the amount indorsed on the said writ of *testatum si. fa.*). The present plaintiffs, as assignees of the bankrupt, requested the now defendant to pay over to them the said sum of 96*l*. 6*d*.; but he declined: and the plaintiffs obtained leave, under sect. 153 of the Bankrupt Law Consolidation Act, 1849, to commence this action; and it was accordingly commenced on 23d May 1851.

The question for the opinion of the Court was, Whether or not, under the circumstances before mentioned, the plaintiffs, as assignees as aforesaid, are entitled to recover from the now defendant the said sum of 96*l*. 6*d*. so received by him under the said execution as aforesaid, or any part thereof. The case was argued in this term (*a*).

Manisty, for the plaintiffs. Stat. 12 & 13 Vict. c. 106. s. 137. enacts "that every Judge's order made by consent

(*a*) April 27th. Before Lord Campbell C. J., Wightman, Erle and Crompton Js.

given" "by any such trader defendant in any personal action, and whereby the plaintiff in such action shall be authorized forthwith after the making of such order, or at any future time, to sign or enter up judgment, or to issue or take out execution in such action," "shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the docquets and judgments in the" "Court of Queen's Bench within twenty one days after the making of such order;" "otherwise such Judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever." It is clear, therefore, that the payment to the defendant on behalf of the bankrupt in the present case, under the execution, is void, the order upon which that execution was issued not having been properly filed; and the plaintiffs, as assignees, are entitled to recover the money so paid. The defendant will probably contend that this order was not "made by consent given" by the defendant in the action, inasmuch as it was at the instance of the defendant himself that the order was made, the consent being given on behalf of the plaintiff. But it is clear that the language of sect. 137 is intended to apply to all Judge's orders made in actions brought against a trader, by consent of either party. In *Bryan v. Child*(a), though the decision there was on a different point, the meaning of sect. 137 was carefully discussed, and the opinion of the Court was clearly in favour of this construction of the section: had the more limited view been adopted, the Court

Queen's Bench.
1852.

FARROW
v.
MAYES.

Volume XVIII. would have intimated as much. It may be fairly contended that, even where the order is made upon the application of the defendant, it is made by his consent; it certainly cannot be made without it.

*FARROW
v.
MAYER.*

O'Malley, contra. The plaintiffs are attempting to apply the provisions of sect. 137 to a case which was never contemplated by the Legislature in framing it. The mischief which the statute was intended to remedy was the practice of evading the practical operation of stat. 3 Geo. 4. c. 39. (*a*) which compelled the filing of all cognovits and warrants of attorney to confess judgment, by getting the consent of the trader to a Judge's order of this description, which placed the property of the trader as much in the hands of the particular creditor as a cognovit or a warrant of attorney. But no mischief is caused by a defendant, at his own request, obtaining an order to stay proceedings in a hostile action upon payment of debt and costs; there no fraud is contemplated or practised upon the other creditors. Such a course stands upon the same footing as a judgment by confession or agreement under the County Court Acts (*b*). Moreover, the order here is not an order made by consent of the defendant in the action, to which alone sect. 137 applies. The order, upon the face of it, shews that the words "by consent" there mean, by consent of the party upon whom the summons was served, namely, the plaintiff in the action. [Lord Campbell C. J. The order in question, whether it be made by consent of the defendant or of the plaintiff in the action, gives the

(*a*) Enlarged by stat. 6 & 7 Vict. c. 66.

(*b*) See stat. 13 & 14 Vict. c. 61. ss. 8, 9.

particular creditor a power of immediate execution over the property of the debtor, which the other creditors have not. Is not that one of the class of orders over which the Legislature meant to exercise a control by compelling them to be registered, under sect. 137?] The statute was not intended to apply to orders made by consent in a hostile action, but only to those which were made collusively by the creditor and the debtor, for the express purpose of giving one creditor a preference over others. And the words "by consent given" "by any such trader defendant," in sect. 137, are too express to allow of that section being construed as applying also to orders made without such consent. It has been argued that, in one sense, every order made upon the application of a defendant is made by his consent. But that is not the ordinary meaning of the words. The order, at all events, cannot be said to be made by the defendant's consent until it is actually served by him. Now here a copy only of the order was served on the plaintiff in the action; it was therefore impossible for him to file the order; for, in the Queen's Bench, by sect. 137, the order itself, and not a copy, must be filed; nor could he make any affidavit of the time of the defendant's consent.

Moreover, sect. 137 was not intended to apply to cases where the order is perfected, by judgment being entered up and the debt being satisfied under such judgment, before any act of bankruptcy on the part of the debtor. The principle of the decision in *Wymer v. Kemble*(a) applies here. It is true that in *Biffin v. Yorke*(b), it was held that, under stat. 1 & 2 Vict. c. 110. s. 60.,

Queen's Bench.
1852.

FARROW
v.
MAYES.

Volume XVIII. a cognovit not filed, and upon which judgment had 1852.

FARROW

v.

MAYES.

not been signed within twenty one days, was void notwithstanding that the proceeds of the execution under judgment had been paid to the judgment creditor before the insolvency of the debtor. But the words of stat. 3 Geo. 4. c. 39. s. 2.; which stat. 1 & 2 Vict. c. 110. extends to insolvents, are much stronger than the language of sect. 137 of stat. 12 & 13 Vict. c. 106. The assignees are entitled, under the first mentioned section, to recover "*all and every* the moneys levied or effects seized under and by virtue of such judgment and execution." Sect. 137 no doubt declares that execution under a Judge's order not duly filed shall be null and void "to all intents and purposes whatever;" but, construing that section in connection with sect. 133, which provides that all executions *bonâ fide* executed and levied against the goods of a bankrupt before the date of the fiat shall be valid, provided the party issuing execution had not, at that time, notice of any prior act of bankruptcy, it is clear that the statute is not intended to avoid judgments which have been perfected by execution before the bankruptcy, and which have not been obtained by way of fraudulent preference. The assignees here claim the money as had and received by the defendant to the use of the bankrupt, and also to the use of the defendants as assignees. But, at the time when the money was paid over to the defendant, no bankruptcy had taken place, and the plaintiff were not yet assignees: their claim, therefore, cannot be supported in its present shape.

Manisty, in reply. As soon as a copy of the order was served upon the plaintiff by the defendant, the

original order became an order made by consent of *Queen's Bench.*
the defendant. The distinction urged on the other side _____
is merely verbal. The argument that the judgment in
the present case was perfected by execution before the
bankruptcy begs the question whether, under the statute,
there was any valid judgment or execution at all. [Lord
Campbell C. J. These orders are very common; and it
is therefore desirable that there should be an uniform
judgment upon this point. We will consult our
brethren].

FARROW
v.
MAYES.

Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment
of the Court.

We are of opinion that the judgment and execution
thereof in the action of *Mayes v. Steward* is rendered
null by stat. 13 & 14 Vict. c. 106. s. 137., because the
Judge's order upon which it was signed was obtained by
consent of the defendant, then being a trader, and was
not filed within twenty one days after such consent
given.

We think the Judge's order for judgment was obtained
by the consent of the defendant, although it was made
upon a bona fide application by the defendant to stay
proceedings upon terms in a hostile action, and although
the defendant had at first wished not to draw up the
order, and only elected to do so because the plaintiff
had an order enabling him to go to trial if it was not
done. No defence arises from the time of this execu-
tion: the course of legislation upon this subject makes
it clear to us that the enactment was intended to render
void all such judgments, though signed within twenty

from the date when the money given and all such other sums received before the issue of the first warrant notice of an act of bankruptcy. We think it follows that the money received under the execution process, by the bankrupt, the money of the assignee, and so forth, come under this description.

The inconvenience arising from rendering a judgment by a bankruptcy makes the filing of Judges' orders for judgment a matter requiring special attention.

Judgment for plaintiff.

London,
May 10.

The WRECK OF FRANCIS.

See also
§ 83 & 84.
c. 78 & 23.
which provides
that no person
shall be qualified
to be
elected coun-
cillor of a
town
during more
than six months
any more or
less than at any
convention with,
or employment
by or in behalf
of, the council,
a person who
has entered
into a contract
with the council,
and been
employed by
them in respect of such contract, is disqualified from holding the office, though such contract required the corporation seal, and is not sealed.

While such contract continues, the disqualification caused by it arises de die in diem; and, during that time, a relator is not precluded, under stat. 7 & 8 Vict. c. 23, s. 23, from applying for a quo warranto, though twelve calendar months have elapsed from the election of the party disqualified, or from the commencement of his disqualification.



Volume XVIII. so as to bind the Corporation; but it does not follow
1852. that it is not such a contract as will disqualify the other

The QUEEN
v.
FRANCIS.

party to it from holding an office in the corporation, under the statute. *Crompton J.* Suppose the contract had become illegal from the corporation paying Mr. *Francis* a larger sum than that fixed upon by the resolution. Would not he be still disqualified from holding office by reason of the contract?] If the contract had been under seal; not otherwise. Corporations may make some contracts by parol: they can dispense with a seal where the proceeding is part of their duty under their constitution, or where it is of a nature which would render the affixing of a seal inconvenient or impossible; *Diggle v. London and Blackwall Railway Company* (a): but the contract here does not fall within that class of exceptions.

Next, this application is too late. Stat. 7 *W. 4* & 1 *Vict. c. 78. s. 23.* provides that all applications for a quo warranto for the purpose of questioning the right to a corporate office must be made "before the end of twelve calendar months after the election or the time when the person against whom such application shall be directed shall have become disqualified, and not at any subsequent time." If Mr. *Francis* has become disqualified, he became so when he was first elected a councillor, which was more than twelve months ago. [Lord *Campbell C. J.* The contract is a continuing one; unless Mr. *Francis* threw it up on his election in 1849, there would be a subsequent disqualification de die in diem.] He had done nothing under the contract

since *July* 1849, before his last election. The words *Queen's Bench.*
1852.
“become disqualified” must mean “first become dis-
qualified;” if not, the statute would in reality impose no
limit at all. [*Crompton J.* By stat. 5 & 6 *W. 4. c. 76.*
s. 28. the disqualification is to continue “*during such*
time as” the party shall have any interest in the contract.
The present case seems to fall within that provision.]

Further, Mr. *Francis* will be out of office before any
judgment can be given upon the return to the quo
warranto; and the Court will therefore, as in *Regina v.*
Hodson(a), exercise its discretion in not acceding to this
application, which might have been made earlier.

Montague Smith, contrà, was stopped by the Court.

Lord CAMPBELL C. J. This rule must be made
absolute. It is quite clear to me that the contract in
question is within the provisions of stat. 5 & 6 *W. 4.*
c. 76. s. 28., so as to disqualify Mr. *Francis* from hold-
ing office. We cannot look to see whether it be a
contract upon which he could sue the corporation; it
is, at all events, one in respect of which he has been
employed and paid by the corporation; and it would be
monstrous to hold that the statute was avoided by the
fact of the contract not being binding upon the cor-
poration. As to the lateness of the application; if Mr.
Smith had been a member of the council at the time
when the contract was entered into, that might have
been a ground for refusing a quo warranto; but he was
not; and his mere knowledge of the existence of the

The QUEEN
v.
FRANCIS.

Volume XVIII. contract at that time is not a ground for holding that he
1852.

cannot now appear as the relator. With respect to stat.
The QUEEN v.
FRANCIS. 7 W. 4 & 1 Vict. c. 78. s. 23., I think that this is a con-
tinuing contract, so as to create a disqualification de die
in diem. No application for a quo warranto could be
made after the lapse of twelve calendar months after
the contract had ceased: but, while it continues, the
application may be made at any time after its com-
mencement.

ERLE J. and CROMPTON J. concurred (*a*).

Rule absolute (*b*).

(*a*) *Wightman* J. was absent.

(*b*) A disclaimer was entered on 13th June following.

END OF EASTER TERM.

No case requiring a report was decided in *Easter*
vacation.

CASES

Queen's Bench.
1852.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH

AND

EXCHEQUER CHAMBER,

IN

TRINITY TERM AND VACATION,

XV. VICTORIA.

The Judges who usually sat in Banc in this Term
and Vacation were :

Lord CAMPBELL C. J.		ERILE J.
COLERIDGE J.		CROMPTON J.

The Company of Proprietors of the KENNEDY and
AVON Canal Navigation *against* CHARLES
HANNINGTON WITHERINGTON.

'TRESPASS for destroying piles and stakes, being part of a dam of plaintiffs in the river *Kennet*.

By a Navigation Act the undertakers were authorized to make and maintain such navigation, and from time to time to alter their dams and weirs for that purpose; and to enter and make works upon lands for the purpose of the undertaking, first making satisfaction to the owners as Commissioners under the Act should direct. By a subsequent clause, any persons injured by the works were to receive compensation, to be assessed by the Commissioners. The Commissioners were named in the Act, and power given them to appoint successors from time to time. The navigation was made; and, as part of it, a dam across a river was enlarged. Subsequently, all the Commissioners died,

Volume XVIII.
1852.

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

without having appointed successors. The Company afterwards raised the dam to the injury of a mill owner below.

Held by Wightman, Erle and Crompton Js., that the power to alter the dam still existed, even though the mill owner should no longer have any means of obtaining compensation, as to which they gave no opinion:

Lord Campbell C. J., dissentient, and holding that, the compensation clause having become incapable of execution by extinction of the Commissioners, the powers which the Act had conferred upon the Company to cause injury to other persons could no longer be exercised.

Plea 1. That the dam was enlarged so as to obstruct the passage of the water, as it was used to flow down to a mill in the occupation of defendant; and that defendant and those who had occupied the mill had for twenty years enjoyed the water as of right; and defendant justified removing so much of the dam as was an obstruction. Pleas 2 and 3 stated similar justifications, claiming the right to the water, respectively, by forty years' user and by prescription in right of *Richard Tull*, who had demised to defendant.

Plea 4 alleged a similar justification, claiming the right to the water by occupation, subject to a right of the plaintiffs to obstruct the water partially by a dam, which they had altered so as to increase the obstruction.

Replication to all four pleas that, by 2 stat. 1 G. 1. c. 24. (a), certain persons were empowered to make and maintain a navigation and works, and Commissioners were nominated to assess compensations; and that, under stat. 53 G. 3. c. cxix., local and personal, public (b), these powers became vested in the plaintiffs, who, for the necessary regulation of the water for the purposes of the navigation, "and for the necessary, reasonable and beneficial use of the said navigation" by "boats, barges, lighters and other vessels," altered and enlarged the dam in question.

Rejoinder that, before the passing of the last mentioned Act, and before the alteration of the dam, all

(a) "To make the river *Kennet* navigable from *Reading* to *Newbury* in the county of *Berkshire*." Reference was also made to stat. 3 G. 2. c. 35., which (s. 12.) enabled the Commissioners to convict trespassers and enforce payment of damages by them.

(b) "To enable the *Kennet* and *Avon* Canal Company to raise a further sum of money to purchase the shares of the river *Kennet* navigation, and to amend the several Acts" (referred to by this statute) "passed for making the said canal."

the Commissioners named in the Act of *Geo. I.*, or appointed under or in pursuance of it, were dead, and that no successors had been appointed.

Demurrer. Joinder.

The demurrer was argued in last Term (*April 23d*)^(a), by *Phipson* for the plaintiffs, and *Whateley* for the defendant. The judgments delivered seriatim by the Court make it unnecessary to report the argument at length.

The material parts of 2 stat. 1 *G. l. c.* 24. are as follows.

Sect. 1 authorizes certain persons named, their heirs and assigns or nominees, "to make the said river *Kennet* navigable, portable, and passable for boats, barges, lighters, and other vessels from the said wharf or common landing place at *Reading* to *Newbury* aforesaid, and from time to time to continue, maintain, and use such navigation in such manner as they shall think fit, and for those purposes to clear, scour," &c. "the said river," &c., "and to make, build up, dig, or cut through the banks of the said river," &c., "and to make such new cuts, trenches, or passages for water in, upon, or through the lands or grounds adjoining or near unto the said river, &c., "as they shall think fit and proper, for navigation and passage of boats and other vessels, or any ways necessary for the more convenient, easy, and better carrying on and effecting the said undertaking, being the soil or ground of the King's most excellent Majesty, his heirs or successors, or of any other person or persons, bodies politic or corporate, their heirs or successors, and to remove and take away all trees" &c. which may hinder navigation, and to build, erect, set up, and make, over or in the said river, &c., or upon the lands adjoining or near to the same, such and so many bridges, sluices, locks, weirs, &c., dams, cranes, wharfs, warehouses, and other works, as and where they the said undertakers, their heirs, assigns, and nominees, shall think fit or convenient, and from time to time to alter, repair, and amend the same, and to make any ways, passages, and other conveniences for the carrying and conveying of goods, to or from the said river, navigable passages, streams, trenches, or cuts, and for carrying materials for erecting or making the said works, and for altering, repairing, or amending the same, and to lay the said materials on the grounds near to the place or places where the said works are to be done, and to alter any bridges, or to turn or alter any highways, in or upon the said river, as may hinder the navigation or

Queen's Bench.
1852.

KENNEDY
and AVON
Navigation
Company
v.
WITHERING-
TON.

(a) Before Lord *Campbell* C. J., *Wightman*, *Erie* and *Crompton* Js.

Volume XVIII.
1852.

KENNET
and AVON
Navigation
Company
v.
WITHERING-

TON.

passage thereon, as also make towing paths &c., "as the said undertakers, their heirs or assigns, shall think convenient, and to do all matters and things which the said undertakers, their heirs, &c., "shall think necessary, for the making and maintaining the said river, streams, cuts, and passages navigable and passable as aforesaid, or for the improvement or preservation thereof; the said undertakers, their heirs and assigns, first giving satisfaction to the owners or proprietors of such lands, weirs, mills, tenements, or hereditaments respectively as shall be digged, cut, or removed, or otherwise made use of for the carrying on or effecting the said navigation, or for maintaining or managing the same, according to the true intent and meaning of this Act as the Commissioners hereafter named for that purpose shall direct and appoint, in case the said undertakers, their heirs, assigns, or nominees, shall not beforehand have agreed with the proprietors of such weirs, mills, lands, tenements, and hereditaments respectively concerning the same."

Sect. 2. "And for the better effecting the premises, and due rating the value of the things for which satisfaction shall be given, according to the intent of this Act, if the persons concerned as aforesaid shall not agree among themselves, be it enacted by the authority aforesaid, that the most noble *Charles Seymour Duke of Somerset*" (and several other persons named) "shall be and are hereby constituted and appointed Commissioners for settling, determining, and adjusting, in manner hereafter mentioned, all matters about which any difference may arise between the said undertakers, their heirs," &c., "and the proprietors of the said lands," &c.; and the "Commissioners, or any seven or more of them, are hereby empowered and authorized, and shall have full power and authority, to mediate between the said undertakers, their heirs, assigns, and nominees, and the owners and occupiers of such lands, weirs," &c. "adjoining to or near the said river, streams, brooks, or watercourses, as shall be intended to be made use of for the carrying on or effecting the undertaking aforesaid, and to settle and determine what satisfaction every such person or persons, bodies politic or corporate shall have for such proportion of his, her, or their lands, tenements, or hereditaments as shall be cut, digged, removed, or made use of as aforesaid, and for the damages that shall be thereby sustained, and to adjust" &c. the proportion of such purchase money or satisfaction to be given to every tenant or other person having a particular estate, &c.: "and if it shall happen that any person or persons, bodies politic or corporate, shall decline such mediation, or refuse to deal or agree with the said undertakers, their heirs," &c., or through any disability or impediment cannot, "the said Commissioners or any seven or more of them are hereby authorized and empowered from time to time to issue out their warrant or warrants under their hands and seals to the sheriff" of *Berks*, for the impannelling and returning a jury, who "shall inquire or assess such damages and recompence as they shall think fit to be awarded to the owners and

Queen's Bench
1852.

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

occupiers of any such lands, tenements, or hereditaments, or any part thereof, as shall be used for or damaged by making the said river navigable, for their respective estates and interests therein, by reason of the cutting, digging, removing, or otherwise using any of his, her, or their lands, tenements, or hereditaments for the purposes aforesaid, or for the loss or damage which they shall or may respectively sustain thereby ; and the said Commissioners, or any seven or more of them, shall give judgment for such sums to be assessed by such juries," which judgment is to be recorded, and "that upon payment of any such sum or sums so agreed on or assessed to the parties concerned, or tender thereof made," &c., "and if upon such tender as aforesaid they refuse or shall not be willing to receive the same, then, upon payment of such sum into the hands of such person or persons as the Commissioners, or any seven or more of them, shall appoint, for the use of the parties interested as aforesaid, it shall then, and not before, be lawful to and for the said undertakers, their heirs, assigns, or nominees, their agents, workmen, and servants, to remove, dig, cut, or use so much of the said lands, tenements, or hereditaments for which such satisfaction shall be assessed or decreed as aforesaid, and thereon to make, erect, or do any works, matters, and things for the effecting and carrying on the said navigation, and for the supporting and maintaining the same, as the said undertakers," &c., "shall think requisite, and to have, use, and enjoy the same to and for their own proper use and benefit ; and this Act shall be sufficient to indemnify, as well the said Commissioners as the said undertakers, their heirs," &c., "and all persons employed or authorized by them, against the said owners and occupiers, their heirs, successors, executors, administrators, or assigns, to all intents and purposes whatsoever :" Proviso : no Commissioner to sit or act in any case where he is interested, or if he do not pay to the land tax for 100*l.* per annum.

Sect. 3 enacts : "That for supplying the number of the said Commissioners (in case of death, or any of their refusal to act,) the surviving or other Commissioners, or any seven or more of them, shall from time to time, by instrument in writing under their respective hands and seals, nominate and appoint some other person or persons within the said county, having an estate of land of the yearly value of 100*l.*, in the place of him or them so dying or refusing, which said new Commissioner or Commissioners so nominated and appointed shall from thenceforth have like power and authority in all things relating to the matters aforesaid as if he or they had been expressly named in this Act ; and every such instrument and nomination of new Commissioners shall from time to time be recorded by the clerk of the peace for the said county."

Sect. 8. "That if the said undertakers, their heirs, assigns, or nominees, shall, in pursuance of the powers of this Act, by any means raise the water in the said river above its ancient or usual height, whereby the adjacent lands may be more liable to be overflowed or damaged than they have

Volume XVIII.
1852.

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

formerly been, that they the said undertakers, their heirs and assigns, at their own proper costs and charges, shall cause the banks of the said river to be proportionately raised and heightened in all places where need shall require, so that the new banks shall be able and sufficient to contain the waters at such their raised height, and also shall from time to time maintain and repair the same banks as often as occasion requires; or if the said undertakers, their heirs or assigns, in pursuance of the powers aforesaid, shall make any new cuts or trenches, by reason whereof any person or persons shall not have convenient ingress or egress into or out of their respective grounds or other hereditaments," &c., that then the undertakers, their heirs &c., at their own cost, shall erect and maintain such sufficient bridges over every such new cut "as by the said Commissioners, or any seven or more of them, shall be directed."

Sect. 18. "That if any person or persons, at any time after the said river is made navigable, shall happen to sustain any damage or injury in his, her, or their meadow grounds, lands, tenements, hereditaments, mills, weirs, water engines, or wharfs, by the said undertakers, their heirs, assigns, or nominees, raising the water to a prejudicial height, or turning the stream, or by not sufficiently making up or repairing the banks of the said river, or cleansing the same, or by their taking away, wasting, or diverting the water from the said meadows, mills, water engines, or wharfs, in such case it shall and may be lawful for the said Commissioners, or any seven or more of them, and they are hereby required, by the inquisition of twelve men, to be impanelled and returned as aforesaid, from time to time to settle and assess such damage or injury, and for securing a recompence or satisfaction for the same to the proprietors of such meadow grounds, lands," &c. "(in case the said undertakers, their heirs, assigns, or nominees, shall not (boing thereto required) satisfy and recompence such damage or injury as shall be settled and assessed as aforesaid, with full costs of suit,) to constitute one or more person or persons to receive the tolls, rates, and duties arising by the navigation of the said river *Kenner*, who shall, out of the said tolls, rates, and duties, in the first place pay and satisfy all and every sum and sums of money so to be settled and assessed for damages and costs as aforesaid; and the moneys so to be received by such receiver or receivers shall and is hereby declared to be esteemed as so much money received to the use of such proprietors or persons suffering damage as aforesaid, till satisfaction made for such damages and costs so settled and assessed as aforesaid, in order and course successively as such determinations for the same shall be in priority of time, and shall be taken, had, and recovered from the receiver or receivers appointed to receive the said tolls, rates, and duties as aforesaid in such manner, and by and with the like powers, privileges, and authorities, as the same are hereinbefore appointed to be taken, had, and recovered by the said undertakers, their heirs, assigns, or nominees."

The points for argument submitted to the Court were: *Queen's Bench.*
1852.

For the plaintiffs. That, as assignees and possessors of the powers granted by the Act of Parliament in the replication first mentioned, they were entitled to make any reasonable alteration in the dam or barrier in the river *Kennet*, mentioned in the declaration, which was necessary for the regulation of the water in the river for the purposes of the navigation. And that the rejoinder, which admits the reasonableness and necessity of such alteration, is bad. And that the powers conferred by the above Act were absolute, and not dependent upon the existence of Commissioners under the Act: and, therefore, that the existence of such Commissioners was not a condition precedent to the exercise of such powers.

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

For the defendant. That, on the true construction of the Act of Parliament in the replication first mentioned, the powers in the assumed exercise whereof the plaintiffs committed the acts sought to be justified in the replication were coexistent with the Commissioners under the Act; and that when the body of Commissioners was extinct the powers could no longer be exercised. That the existence of the right and the means of obtaining compensation is a condition precedent to the exercise of the powers; and, the body of Commissioners having become extinct, the right and means of obtaining compensation no longer exist.

Besides the case referred to in the judgments of the Court, *Boulton v. Crowther* (*a*), *Glover v. North Staffordshire Railway Company* (*b*), *Thickness v. The Lancaster Canal Company* (*c*), and *Cane v. Chapman* (*d*), were cited for the plaintiffs; and *Stourbridge Canal*

(*a*) 2 *B. & C.* 703.

(*b*) 16 *Q. B.* 912.

(*c*) 4 *M. & W.* 472.

(*d*) 5 *A. & E.* 647.

Volume XVIII. *Company v. Wheeley (a), Ballard v. Way (b), Holland's Case (c), and Buckeridge v. Flight (d), for the defendant.*
 1852.

Cur. adv. vult.

KENNET
and AVON
Navigation
Company

v.
WITHERING-
TON.

In this Term (*June* 12th), there being a difference of opinion on the Bench, the learned Judges delivered separate judgments.

Crompton J. CROMPTON J. This was an action of trespass for cutting and breaking certain piles, stakes and burdles, forming part of a dam of the plaintiffs in the river *Kennet*. The defendant justified the removing the part of the dam in question, on the ground that it was an enlargement of a dam formerly erected, and that such enlargement obstructed the water formerly allowed to pass by the dam, and which water the defendant claimed a right to in respect of his mill. The plaintiffs stated, in their replication, that the dam was enlarged by them for the purpose of maintaining the navigation of the *Kennet*, under the powers of an Act of Parliament, 2 stat. 1 G. 1. c. 24. The defendant rejoined, shewing that all the Commissioners nominated in the Act of Parliament for the purpose of settling compensation for damages, and all Commissioners subsequently nominated under the Act, were dead, and that no Commissioners were in existence when the dam was enlarged.

The plaintiffs having demurred to this rejoinder, the question arose whether the powers under which the plaintiffs had acted had been lost or destroyed by the

(a) 2 B. & Ad. 792.

(b) 1 M. & W. 520, 529. S. C. Tyr. & G. 851, 862.

(c) 4 Rep. 75 a, 76 a, b.

(d) 6 B. & C. 49. Affirming the judgment of the Common Pleas in *Flight v. Buckeridge*, 3 Bing. 215.

death of all the Commissioners named in the Act or *Queen's Bench.*
subsequently appointed, and by reason of no Commissioners under the Act being in existence at the time of
the making the works mentioned in the replication.

1852.

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

Crompton J.

By the 1st section of the Act powers are given to seven persons named in the Act, their heirs, assigns and nominees, to make the river *Kennet* navigable, and from time to time to continue, maintain and use the navigation, and to dig and cut through the banks of the river, and to erect in the river, and upon the lands adjoining or near to the same, weirs, pens, dams, &c., and from time to time to alter, repair and amend the same, and to do all matters and things which they should think necessary for the making and maintaining the river navigable, or for the improvement and preservation thereof, the said undertakers &c. *first* giving satisfaction to the owners &c. of such lands, weirs, mills, tenements or hereditaments respectively as shall be digged, cut or removed, or otherwise made use of for the carrying on or effecting the said navigation or for maintaining or managing the same, as the Commissioners named for the purpose should direct, in case the undertakers should not beforehand have agreed with the proprietors of such weirs, mills, lands, tenements and hereditaments respectively concerning the same.

By the 2d section Commissioners are appointed to mediate between the undertakers and the owners and occupiers of such lands, mills, tenements and hereditaments, adjoining to or near the river, as should be intended to be made use of, and to settle the satisfaction the parties were to have for such proportion of their lands &c. as should be cut, digged, removed or made use of; and powers of settling disputes by a jury are

Volume XVII. then given to the Commissioners; and the undertakers,
1852. upon payment, "and *not before*," were authorized to

**KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.**

Crompton J.

remove, dig, cut and use the lands &c.

According to these clauses, the satisfaction to the owners in the manner prescribed was made a condition precedent to the digging and using the lands of the adjoining owners: and, as the non-existence of the Commissioners precludes the assessing satisfaction in the mode prescribed, no powers of this description could be exercised after the Commissioners ceased to exist, except in the case of an agreement between the undertakers and the owners.

This provision for an antecedent satisfaction was properly applicable to the taking and injuring land, the compensation for which could be settled beforehand; but it was not applicable to many cases of consequential damage; and accordingly the Act of Parliament does not include such cases in the provision for compensation to which I have referred. This provision in the 1st section is much narrower than the powers given by that section, and only includes compensation for the direct trespasses to the land which it specifies. It was proper, therefore, to make other provisions for compensation for consequential damages; and this was attempted to be done by the 18th section of the Act. (His Lordship read part of the 18th section; *antè*, p. 536.) The making satisfaction for damages of this description could not be made a condition precedent to the doing the act which might cause the damage; and accordingly in this section provision is made for subsequently ascertaining and settling and recovering such damages.

The damage sustained by the millowner in the present case was of this latter class; and, according

to the intention of the framers of the Act, he ought, *Queen's Bench.*
after the acts done and the mischief sustained, to have
had his compensation assessed for the damages which
the exercise of the powers had occasioned.

The question is whether, by reason of the mode of assessing the amount of such damage being lost, the plaintiffs have lost the powers expressly given them by the 1st section, and the exercise of which is not made to depend upon a prior satisfaction.

It was argued before us that the Legislature must be taken as impliedly enacting that powers, the exercise of which must be injurious to the millowners, and which the Legislature would not have given without a compensation clause, should cease on the cessation of the powers of compelling compensation. It could not be said that the making satisfaction was a condition precedent to the exercise of these powers; but it was said that the powers were coexistent with the Commissioners under the Act, and that the existence of the means of obtaining compensation was a condition precedent to the exercise of the powers.

It appears to me that, if we were to yield to this argument, we should rather be making the Act of Parliament than construing it. The first section gives what may be called two classes of powers: one is to be exercised only on a condition precedent being complied with; the Act is silent as to any prior condition with respect to the other. It is true that, in all probability, the Legislature thought that they had sufficiently provided for the compensation to the millowners; and that, if they had foreseen what has happened, they would not have left the millowners without compensation; but their course probably would have been to have given

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

Crompton J.

*Volume XVIII
1852.*

KELSET
and AROS
Navigation
Company
v.
WITHERING-
TON.

Crompton J.

the compensation in a more secure way, and not to have taken away the powers.

Can we properly imply a condition which is to take away the powers expressly given by the statute, because the Legislature have failed in making a sufficient provision for compensation made to parties injured by the exercise of those powers? I find express powers given by the Act, which are clearly sufficient for the purposes for which they have been used. I cannot say that these powers have ceased, by implying a condition, which the Legislature have never contemplated, from circumstances which they had not in their contemplation, and which if they had contemplated, they would, in my opinion, have guarded against, *not* in the way now suggested, by taking away the powers, but by providing some other mode of assessing compensation. If I were to make any implication from what I may speculate upon as to the intention of the Legislature, I should think it a less straining of the Act to imply that in such a case a reasonable compensation should be recoverable, than to imply that the powers were to cease. The Legislature did intend that compensation should be made, though they have failed in the mode of carrying it out; but they neither contemplated nor intended that the powers which may be necessary for the preservation of the very existence of the navigation should cease.

It must be remembered that the non-existence of Commissioners has not happened through the default of the plaintiffs or the undertakers whom they represent. The Commissioners were a distinct body; and it is through their negligence in not filling up vacancies according to the directions of the Act that the mischief has occurred.

It would be equally hard on the plaintiffs to have the *Queen's Bench*.
navigation injured through the want of the powers _____
necessary for its maintenance and preservation as it is
for the defendants to sustain the injury to their mill.

Finding that the Legislature have expressly given the powers in question, and that they do not take them away by any express words in the event that has happened, I do not think that I can imply that these powers are to cease because the Legislature have not provided a sufficient mode for settling and recovering the compensation. If they had given no compensation through inadvertence, the powers would have been good. The case appears to me to be the same when the compensation fails, the powers being given to be exercised before the compensation is to be inquired into.

I have assumed, for the purposes of my judgment, that no mode of obtaining compensation exists; because I think that, even in that case, the law is in favour of the existence of the powers. I do not, however, wish to be considered as saying that there is no mode of obtaining satisfaction. There seem grave objections to the modes which were adverted to in the argument as possible modes of obtaining compensation (*a*); but I am by no means certain that some mode may not exist. It is not, however, necessary to decide this point, as I think that the powers do not cease even if all power of obtaining compensation is gone.

I think, therefore, that the rejoinder contains no sufficient answer to the replication, and that the plaintiffs are entitled to our judgment that the rejoinder is bad.

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

Crompton J.

(*a*) See pp. 544, 551, post.

From 1772 to 1852. Erie J. I agree in the judgment of my brother Cromwell.

Keeler
and Associates
Navigation
Company
v.
Wilmington
Tow.

Erie J.

The question in substance appears to me to be, whether the right given by statute to the Canal company, to raise a weir for the necessary purposes of the canal, is taken away by law in the event that the right given to the owner of a mill by the same statute, to recover compensation for consequential damage to his mill through Commissioners, is lost because there are no Commissioners. And I think the answer must be in the negative. The right of the Canal company is given unconditionally; and at the time when the right is exercised it is contingent whether there will be any damage to be compensated. If one of the two parties is to lose his right, the Canal company has the priority in the order of exercising the right; and the owner of the mill can shew no reason why his rights should be preferred to the rights in the canal, which are both public and private.

Further, there appears to me to be ground for holding that an action would lie against the Company for not making compensation, because, when the right to raise the weir was created, the duty of compensating in case of damage was imposed; and, though a special tribunal for awarding such compensation was created, with a special remedy by a receiver of the tolls, yet, as a right to such compensation exists at common law, and that common right was rather restricted by the statute than created by it, the special remedy may be concurrent with the action at common law, or the common law remedy may be revived upon the failure of the special remedy. But, whether this be correct or not, the plaintiffs seem

to me to be entitled to judgment for the reason before Queen's Bench.
given. 1852.

WIGHTMAN J. The case, as it appeared upon the pleadings, having been stated by my brother *Crompton*, it is unnecessary for me to repeat it.

It being admitted that the compensating power given by the Act of Parliament is gone, the question for our consideration is, whether the power of the Company to make such alterations in their dams and other works as may be necessary for maintaining their navigation is gone also, if such alterations are detrimental to the rights of others acquired subsequently to the constructing of the original dams or works.

The dam was originally constructed and the alterations made under the powers given by the 1st section of 2 stat. 1 G. 1. c. 24. By that section the Company were empowered to make, over or in the river *Kennet*, such dams and other works as they might think fit, and from time to time to alter the same, and to do all such things as they might think necessary for maintaining the river navigable, or for the improvement or preservation thereof; *first giving satisfaction* to the owners or proprietors of such lands, weirs, mills, tenements or hereditaments as should be digged, cut or removed, or otherwise made use of for the carrying on the navigation, as the Commissioners thereafter named should direct, in case the parties could not agree.

Under this clause the defendant would not be entitled to compensation, even if the Commissioners were still in existence, as the condition of "first giving satisfaction" applies only to the actual taking or using the lands &c. of others, and not to consequential damages arising to

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

Wightman J.

C. S. TRINITY TERM.

~~Persons whose lands are~~ persons whose lands are, may be injuriously affected by
~~1655~~ the acts of the Company, through the taken or used by
~~them.~~

~~1655
and 1656
Navigation
Company
Navigation
Act~~

~~William J.~~

But by the 16th section of 2 & 3 G. I. c. 24, it is enacted that if any person shall happen to sustain any damage to his lands, mills, &c. by the Company raising the water, or diverting or taking away the water, the Commissioners are required to assess the damages by a jury.

This clause for compensation is a separate and independent clause, and not by way of condition either precedent or subsequent to the powers given to the Company by the 1st section of the Act.

The Act contains a provision for the supplying of vacancies in the commission by other Commissioners, to be named by those who remain; but it has happened that all the original Commissioners have died without exercising this power; and, in consequence, no proceeding for compensation can now be taken under the Act.

It appears to me, however, that the neglect of the Commissioners to appoint successors, which is not imputable to any default on the part of the Company, does not affect the right of the Company to do whatever they are empowered to do by the 1st section. It was no doubt intended by the Legislature that compensation should be given in such a case as that in question; but the statute is so framed that the compensation clause cannot be carried into effect. This may be a hardship upon those whose lands or mills are injuriously affected by the works of the Company; but it would be equally hard upon the Company if their navigation was entirely stopped on that account.

I am therefore of opinion that, as the enabling powers given by the 1st section are not by the Act made subject to the compensating power contained in the 18th section, nor dependent upon it, the Company might lawfully do what they have done; and that the defendant was not justified in pulling down part of the dam; and that the power given by the 1st section to the Company did not cease because another power, given by another independent section of the Act, to recover compensation in case injury was done in exercise of the power given by the 1st section, had expired. The case of *Lister v. Lobley* (*a*) is an authority in the plaintiffs' favour, shewing that an authority given by statute to do acts injurious to the property of another, giving satisfaction for the damage done, is not made void by the failure of the means for obtaining satisfaction pointed out by the statute.

Whether the defendant may, or may not, be entitled to compensation independently of the provisions of the statute, it is not necessary now to consider, as, however that may be, it appears to me that the defendant was not justified in pulling down the part of the dam which the plaintiffs had erected under the authority of the Act of Parliament.

I think that the plaintiffs are entitled to our judgment.

Lord CAMPBELL C. J. In this case, unfortunately, I differ from my learned Brothers: but, as, after great deliberation, I strongly entertain a contrary opinion, it is my duty to declare it.

The defendant has a clear answer to the trespasses complained of and is entitled to our judgment, unless

Queen's Bench.
1852.

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

Wightman J.

Lord
Campbell C. J.

Volume XVIII. the plaintiffs had a right, under 2 stat. 1 G. 1. c. 24., to raise the dam across the river *Kennet*, and thereby to cut off the supply of water which, it is admitted, had immemorially flowed for the driving of his mill. If the Board of Commissioners appointed and directed to be continued by the 2d and 3d sections of the statute had been duly continued, so that the defendant might have

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

Lord
Campbell C. J. had compensation for the loss occasioned to him by the raising of the dam, they would have had a right to raise it as they have done, "for the necessary, reasonable and beneficial use of" the navigation by "boats, barges, lighters and other vessels." But the question is, whether they could exercise this power to the detriment of the defendant after all the Commissioners named in the statute were dead, and no successors to them had been or could be appointed.

I think that this power was not absolutely perpetual, but depended upon the condition of the Board of Commissioners being duly continued, so that compensation might be given for the very serious loss which the exercise of it might occasion. By the 1st section of the statute two classes of powers are conferred on the owners of the navigation; one to be exercised upon the soil of others, and another class to authorize acts whereby consequential damage would arise to proprietors on the banks of the river. The granting of compensation through the instrumentality of the Commissioners is expressly made a condition precedent to the exercise of the first class of powers: "the said undertakers, their heirs and assigns, first giving satisfaction to the owners or proprietors of such lands, weirs, mills, tenements, or hereditaments respectively as shall be digged, cut, or removed, or otherwise made use of for the carrying on

or effecting the said navigation." It is quite clear, *Queen's Bench*.
therefore, that these powers can no longer be compulsorily exercised. 1852.

As the consequential damage arising from the exercise of the second class of powers in some cases could not be foreseen, and the amount of it could hardly ever be justly estimated by anticipation, no previous satisfaction is provided for it: but sect. 18 enacts that, if any person shall sustain any damage in his mills by the owners of the navigation taking away or diverting the water from the said mills, or any similar injury, the Commissioners shall, by a jury impanelled as therein is directed, assess such damage and appoint a receiver of the tolls, who shall, from the tolls received, pay the amount of the compensation assessed to the party grieved.

Although this compensation is to come *after* the act has been done which causes the damage, can it be supposed that the Legislature intended to confer a power of doing such an act after all possibility of obtaining compensation for it has ceased, and has ceased through the default of the owners of the navigation? They had an interest and a duty to keep up the Board of Commissioners: and there can be no doubt that, on their application, this Court would have granted a mandamus, under sect. 3 of the statute, for the appointment of new Commissioners.

Suppose that the clause conferring those extraordinary powers over the property and rights of others had begun with a preamble, "whereas there is provision herein-after made by the appointment of a Board of Commissioners, whose continuance the owners of the navigation may procure, for making compensation to those who may suffer from the exercise of such powers:" could it

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

Lord
Campbell C. J.

. 1. THE DEFENCE

... and therefore the Court must have been
convinced that the owners of the navigation, who were
the trustees under the act of the Board of Commis-
sioners, had a absolute retrospective power. Now that the
legislation is in the first instance to suppose it does
not give any discretion at the commencement that were to follow.
Now that for the exercise of the extraordinary
power contained in this statute no strict conditions
in the nature of the navigation preventing the power
of making compensation. We think not suppose that
Parliament has enacted what would be most arbitrary
and injurious if the language employed by it will bear
a construction consistent with reason and justice; and,
availing in the name of this statute. I think the meaning
if it may fairly be taken to be, that the extraordinary
powers which it confers to seize or injure the property
of others, were only to be exercised while the owners of
the navigation took care that compensation might be
claimed in the manner prescribed. The defendant's
mill could no longer be taken from him without his
consent for the purposes of the navigation: and why
should it be supposed that the Company have now the
power of diverting the whole of the water which ought
to flow to his mill, whereby his mill may be rendered
useless and he himself may be ruined?

The extreme improbability of such legislation being
admitted, an attempt was made to argue that the de-
fendant may obtain compensation, although not by
means of the Commissioners. But, on the supposition
that the act of raising the dam, whereby all the water
was diverted from the defendant's mill, was lawful, no
satisfactory mode has been pointed out in which com-
pensation can be obtained. It is quite clear that the

common action on the case for wrongfully diverting the water would not lie; for this supposes a conjunction of injury and loss, and here would be an instance of *damnum absque injuriâ*. But it has been suggested that the Legislature must have meant that compensation should be granted; and that an action of *assumpsit* might be supported on an implied promise to make compensation, or in tort for a breach of duty in not making compensation. But, while the statute, by the 18th section, provides compensation in a manner that can no longer be put in use, and anxiously gives an effectual remedy for obtaining payment of the sum assessed, it no where else mentions compensation for such a loss as the present. All the powers created by the 1st section, while they exist, are absolute, except as to awarding compensation through the medium of the Commissioners; and, if these powers now exist, they are altogether absolute. How, then, can there be any implied promise to make compensation, and how is any such duty imposed?

The plaintiffs' counsel relied on the case of *Lister v. Lobley* (*a*), in which this Court intimated an opinion that an action might be maintained for compensation by the owner of houses and lands, after they have been taken under the authority of an Act of Parliament, although trespass would not lie for taking them without having previously made or tendered compensation. But there the Act authorized road trustees to enter upon and take certain lands, and to pull down certain houses, "making or tendering satisfaction to the owners" of all lands and houses so taken "for any loss or damage they

Queen's Bench.
1852.

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

Lord
Campbell C. J.

magistrate thereon? Thus a duty was imposed upon the trustees, after taking the land and houses, to make compensation for such loss and damage: and, although for breach of this duty they were not to be considered responsible *in personam*, the law would furnish an easy remedy. In the present case the statute contemplates no compensation, except by an application to the Commissioners: and, as there no longer are Commissioners, if the act of raising the dam was lawful, no compensation can be obtained for the loss which the defendant has thereby suffered. The framers of the statute very possibly did not foresee the extinction of the Commissioners: but I think the intention of the Legislature must be considered to have been that, upon the extinction of the Commissioners, the extraordinary powers conferred upon the owners of the navigation over the property and rights of others ceased. No hardship will follow from the conclusion that thenceforth all parties interested were to continue in the enjoyment of the property and rights which then belonged to them, with the power of voluntarily entering into any new arrangement for valuable consideration. The act of raising the dam might improve the navigation and increase the profits of the shareholders; but it would be strange if such a power existed without any compensation being given to the defendant, whose mill thereby becomes a useless mass of stones, timber and iron.

It seems to me that the Company acted unlawfully when they raised the dam and cut off the supply of water from the defendant's mill, so that he might have brought an action against them for doing so; and in this action he has a good defence for the alleged trespasses he committed in removing the obstruction which

they had unlawfully caused to the enjoyment of his *Queen's Bench.*
rights. 1852.

But, as my Brothers are of a contrary opinion, there must be judgment for the plaintiffs.

Judgment for plaintiffs (*a*).

KENNET
and AVON
Navigation
Company
v.
WITHERING-
TON.

(*a*) Reported in part by *C. Blackburn*, Esq.

BASTOW *against* GANT.

Saturday,
May 22d.

Reported, 13 Q. B. 807. (note).

The QUEEN *against* T. J. ARNOLD, Esquire. Monday,
May 24th.

The QUEEN *against* The Clerk of the Peace and The
Treasurer of MIDDLESEX.

PASHLEY moved (*a*) for a certiorari to bring into this Court, for the purpose of their being quashed, the two following orders made by *Thomas James Arnold*, Esq., a Police Magistrate of the Metropolis, sitting at the *Westminster* Police Court within the Metropolitan Police district.

By the first order, dated 3d February 1852, directed

(*a*) Before Lord Campbell C. J., Coleridge, Erle and Crompton Js.

Under stat.
12 & 13 Vict.
c. 103. s. 5.,
if a pauper
lunatic, born in
Ireland and
having no *Eng-*
land settlement,
is removed to
an asylum after
five years' re-
sidence in a
parish in
England from
which, if sane,
he would have
been irremo-
vable.

able by stat. 9 & 10 Vict. c. 66., the union, not the county, is liable to the expenses of his removal and maintenance.

Volume XVIII. to The Guardians of the Poor of the *Whitechapel* Union, *Middlesex*, within the said district, and to *Heaton Ellis*, Esq., the Clerk of the Peace for *Middlesex*, the

*The QUEEN v.
ARNOLD.*

magistrate recited a complaint made to him by the relieving officer of the *Whitechapel* Union, "that *Luke Cone*, a poor person chargeable to the common fund of the *Whitechapel* Union, is at present legally confined in the *Kent* County Lunatic asylum, situate at" &c. in the said county of *Kent*, as a lunatic, at the cost and expence of the common fund of the said Union; and that the said pauper lunatic is not legally settled in any parish in the said *Whitechapel* Union; and that the said pauper lunatic has not acquired a settlement in any parish or place in *England*; and that he the said *Luke Cone*, such lunatic, is an *Irishman*, and, while resident in the parish of *Christchurch* in the *Whitechapel* Union, became chargeable to the said parish for one day, but was afterwards made chargeable to the common fund of the *Whitechapel* Union by reason of his having resided for five years previously in the said parish, and was sent to the said County asylum from the said *Whitechapel* Union on the 28th day of *May* 1851, and hath ever since been confined in the said asylum: and that, at the time when the said *Luke Cone* was so sent to the said asylum, he had resided in the said parish of *Christchurch* for five years and upwards, and would, if not lunatic, have been exempt from removal out of the said parish if he had been chargeable thereto, by reason of the provision of the statute passed" &c. (9 & 10 Vict. c. 66.), "if such statute be applicable to the case of an *Irishman* residing in a parish in *England*, and who has not gained any *English* settlement." The order then, after further reciting that Mr. *John William*

Allen, on behalf of the clerk of the peace, was present in pursuance of notice to the clerk, went on to state that the magistrate, at the request of the relieving officer, had proceeded to inquire upon oath into the circumstances of the case, and it was duly made to appear to him that the premises were true: and he therefore adjudged the same to be true, and did "adjudge the said *Luke Cone* to be chargeable to the said county of *Middlesex*, according to the form of the statute in such case" &c. The order was duly served.

Queen's Bench.
1852.

The QUEEN
v.
ARNOLD.

The second order, directed to the Treasurer of the County of *Middlesex*, and dated also on 3d *February*, 1852, recited the former order, and recited also that proof had been given to the magistrate as to the expenses incurred by the *Whitechapel* Union in and about the examination of the lunatic, his conveyance to the asylum, his lodging, maintenance &c.: and it directed the county treasurer to pay the amounts respectively to the treasurer of the Union, and also a certain weekly sum, so long as the lunatic should be confined in the asylum, for his future lodging, maintenance &c. This order was duly served.

Notice of the present motion was served upon the magistrate and clerk to the guardians by the attorney for the treasurer and clerk of the peace as parties aggrieved by the said orders respectively.

The above facts and documents were verified by affidavit.

Pashley now argued as follows. By stat. 8 & 9 Vict. c. 117. s. 2. (which, by sect. 7, is to be construed as part of stat. 4 & 5 W. 4. c. 76.), *Irish paupers* chargeable to any parish in *England*, and not having an *English* settlement, were removable to *Ireland*. By stat. 9 & 10 Vict.

Volume XVIII. c. 66. s. 1., no person other than a pauper lunatic
1852. may be removed from a parish where he has resided

The QUEEN
v.
ARNOLD.

five years. Stat. 10 & 11 Vict. c. 110. s. 1., reciting the last mentioned act, provides that all the expenditure which shall be incurred by any parish forming part of a union for the maintenance of any person who shall, within one year before the passing of the recited act, have been in the receipt of relief from some other parish by right of settlement therein, and who, by the recited act, is exempt from liability to removal, shall, during such exemption, be charged to the general fund of such union. That act was to continue in force till *October* 1848. Then, by stat. 11 & 12 Vict. c. 110. s. 3., it was again enacted that the costs of relief given to any poor person who, not being settled in the parish where he resided, was or should become irremovable by stat. 9 & 10 Vict. c. 66., should, where the parish formed part of a union, be charged to the common fund of such union during the exemption. This enactment was also limited in duration to *September* 1849; in which year stat. 12 & 13 Vict. c. 103. was passed, enacting (sect. 5) that the expenses to be incurred in "obtaining any order of justices for the removal and maintenance of a lunatic pauper who shall have been or shall be removed" by such order to an asylum, "and who, if not a lunatic, would have been exempt from removal by reason of some provision in" stat. 9 & 10 Vict. c. 66., shall, during a specified time, be borne by the common fund of the union comprising the parish where the pauper was resident when removed. This last enactment was construed, in *Overseers of Wigton v. Overseers of Snaith* (a), to include the expenses of maintenance

as well as those of obtaining the order, and was held, in *Regina v. Priest Hutton* (a), to comprehend a union under *Gilbert's Act*, 22 G. 3. c. 83. The intention of the Legislature must have been that the enactment in stat. 12 & 13 Vict. c. 103. s. 5. should receive the most general construction.

Queen's Bench.
1852.

The QUEEN
v.
ARNOLD.

An *Irish* pauper, like an *English* one, would be irremoveable, if sane, by stat. 9 & 10 Vict. c. 66.; and the consequence is peremptorily fixed by stat. 12 & 13 Vict. c. 103., namely, that the expence of removing and maintaining him, if a lunatic, shall be borne by the union within which he resides.

Bodkin shewed cause in the first instance. Stat. 8 & 9 Vict. c. 126. s. 59. provides that, if a pauper lunatic is not settled in the parish by which he is sent to an asylum, and it cannot be ascertained in what parish he is settled, he shall be adjudged (unless cause to the contrary be shewn) chargeable to the county; and sect. 63 points out the course for charging the county treasurer on such an adjudication. The case of an *Irish* pauper is the same, for this purpose, as the case of a pauper whose settlement is unknown. Stat. 9 & 10 Vict. c. 66. merely makes such a pauper irremoveable. Stat. 11 & 12 Vict. c. 110. s. 3. transfers the burden of maintenance from the parish to the union, in cases where the pauper is irremoveable by 9 & 10 Vict. c. 66.: but neither act takes any notice of cases where no settlement can be found. Nor does the act 12 & 13 Vict. c. 103. s. 5. make any reference to the case of lunatics having no ascertainable settlement, and who are there-

(a) 17 Q. B. 59.

Volume XVIII. fore chargeable to counties under stat. 8 & 9 Vict.
1852. c. 126. sect. 59. The concluding words of stat. 12 & 13

The QUEEN

v.
ARNOLD.

Vict. c. 103. s. 5. are "notwithstanding the order for the payment thereof shall have been made upon the overseers of such parish, or the parish of the settlement, or upon the treasurer or guardians of the union in which either parish shall be comprised." Orders upon county treasurers are not alluded to. One object of the Act, provided for by sect. 3, is, that chargeability to the common fund of a union shall have the same consequences as chargeability to a parish, in respect of proceedings under certain statutes, among which are the statutes for the removal of lunatic paupers to asylums. There was evidently no intention to disturb the enactments of stat. 8 & 9 Vict. c. 126.

Pashley, in reply. The argument on the other side requires sect. 5 of stat. 12 & 13 Vict. c. 103. to be read as if the words were "for the removal and maintenance of a lunatic pauper, *having a settlement in England*, who shall have been" &c. It is supposed, for the purpose of the argument, that, if a man has no *English* settlement, he cannot be "removed" within the meaning of stat. 9 & 10 Vict. c. 66., and therefore is not "exempt from removal by reason" of any provision in that Act. An *Irishman* or a *Scotchman*, having gained no settlement here, is removable to his own country, as an *Englishman* having a settlement is to his own parish: and stat. 9 & 10 Vict. c. 66. prevents the removal in both cases. [Lord Campbell C. J. *Ireland or Scotland* is quasi the settlement of an *Irishman* or *Scotchman*]. The object of the concluding words of stat. 12 & 13 Vict. c. 103. s. 5. is merely to assist the guardians there

mentioned in doing that which would else be done by *Queen's Bench*.
overseers or guardians acting for the parish of settlement. 1852.

Lord CAMPBELL C. J., in the ensuing vacation (*June 18th*), delivered the judgment of the Court.

In this case the question is raised, whether the expence of maintaining a pauper lunatic who was exempt from removal by five years' residence, and who is without a settlement in *England*, being *Irish* by birth, and found to have gained none, is to be borne by the union or the county. And we are of opinion that it is cast upon the former by stat. 12 & 13 Vict. c. 103. s. 5., enacting that the costs of the order for removal and maintenance in the case of a lunatic pauper so exempt shall be borne by the union.

This is admitted in the case where the lunatic pauper has a settlement; and, if full effect is given to the words, they include also lunatic paupers who have no settlement. In the first case they transfer the burden from the parish of settlement to the union within which the five years' inhabitancy took place, upon the principle that such inhabitancy has many of the properties of a settlement: and we see no reason why the Legislature should not have intended to make a transfer from the county to the union in the latter case, as it has used words wide enough so to operate, and the reason for the transfer applies equally in both cases.

Rule absolute.

The orders being returned under the certiorari, The QUEEN v.
Pashley in the ensuing Michaelmas term obtained a Treasurer of rule to shew cause why they should not be quashed. MIDDLESEX.

Volume XVIII. In the same term (November 17th) *Atherton* (with whom
1852. was *Bodkin*) stated that he had instructions to support
The QUEEN v.
Treasurer of MIDDLESEX. the orders. [Lord *Campbell C. J.* As there can be no
writ of error, you may argue for the purpose of shewing
that we ought to review our judgment; but our opinion
was formed upon argument, and after taking time to
consider.] *Atherton* then said that he had no fresh
grounds to urge, and could not hope to alter the decision
of the Court. [*Coleridge J.* We felt all the difficulty
that arose in the case, and considered it carefully.]

Per Curiam (a).

Rule absolute (b).

(a) Lord *Campbell C. J.*, *Coleridge*, *Wightman* and *Erle Js.*

(b) Stat. 12 & 13 Vict. c. 103. s. 5. is repealed by stat. 16 & 17 Vict. c. 97. s. 102.; and a similar provision is thereby made in its stead for the case of a pauper lunatic who would have been exempt from removal "to the parish of his settlement or the country of his birth" under stat. 9 & 10 Vict. c. 66.

Tuesday,
May 25th.

ALLAN and another against LAKE.

Defendant, by his agent, sold plaintiffs a parcel of turnip seed, and gave the following sold note : "Mr. T. C. R." [defendant's

agent]. "Sold to Messrs B. & Co." [plaintiffs] "for Mr. C. L." [defendant], "14 quarters *Skirving's Swedes*, at 17s. per bushel." Defendant's agent afterwards sold plaintiffs a second parcel of turnip seed, stating that it was "of the same stock" as the first parcel. No sold note was given; the invoices described it as "24½ quarters of turnips."

Held: As to the first parcel, that the jury was properly directed that the description of it in the sold note amounted to a warranty that it was *Skirving's Swedes*.

As to the second parcel, that the statement of defendant's agent that it was "of the same stock" as the first, on the subsequent sale to plaintiff, was evidence for the jury of a warranty that the second parcel also was *Skirving's Swedes*.

CASE. The 1st count stated that plaintiffs, on 1st May, 1850, bargained with defendant to buy of him the produce of six acres of turnip seed for the price of 13s. for each quarter of the said seed; and defendant, in the

course of the said bargaining, falsely warranting the said *Queen's Bench.*
seed to be of a kind called *Skirving's Swedes* turnip seed, 1852.
induced plaintiffs to buy and accordingly then sold the
same to plaintiffs; whereas in truth and in fact the said
seed so sold was not, at the time of the said warranty as
aforesaid, of the said kind called *Skirving's Swedes* turnip
seed, but of another and different kind, and inferior to,
and less valuable than, *Skirving's Swedes* turnip seed.
The second count was similar to the first, except that
it related to a second parcel of turnip seed, the produce
of four acres. The declaration then averred that by
means of the said several premises defendant falsely and
fraudulently deceived plaintiffs on the said several sales;
and alleged special damage.

ALLAN
v.
LAKE.

Plea: Not guilty. Issue thereon.

On the trial, before Lord *Campbell C. J.*, at the *London* sittings after *Easter* term, 1852, it appeared that the plaintiffs were seedsmen in *London*, trading under the name of *Beck and Co.*, and the defendant was a farmer. In *May*, 1850, one of the plaintiffs, in company with *Reed*, a cornfactor and agent for the defendant, saw six acres of turnips belonging to the defendant in bloom, and agreed to buy the seed produced by that crop. On 3d *August*, 1850, fourteen quarters of turnip seed, the produce of the six acres in question, were delivered to the plaintiffs; and the following sold note was given to them shortly after.

“Mr. *T. C. Reed.*

Aug. 5 { Sold to Messrs. *Beck & Co.* for Mr. *C.*
1850. } *Lake* 14 quarters *Skirving's Swede* (@ 17/- per
bushel.”

Volume XVIII. The note was accompanied by the following invoice:
1852.

ALLAN v. LAKE.	"Messrs. Beck & Co.
1850.	To C. T. Reed,
August 5.	14 quarters Turnip @ 136/-
	Short
	14 10
	<hr/>
	£94 9 2"

A few days afterwards another parcel of turnip seed was sold by *Reed* to the plaintiffs, *Reed* stating it to be of the "same stock" as the former, and calling it *Skirving's Swedes*. No bought or sold note was given on this occasion. The invoices described the seed as "24½ quarters of turnips."

In *May*, 1851, samples of the two parcels of seed were sown by the plaintiffs. The crop partly failed; and of those plants which made their appearance the greater part were not of the description called *Skirving's*, but of an inferior and spurious kind.

It was objected, on behalf of the defendant, that the plaintiffs ought to be nonsuited on two grounds; first, that, as regarded the first parcel of seed, the sold note did not amount to a warranty by the defendant that the seed was *Skirving's Swedes*, but contained merely a representation or description of it by that name; secondly, that there was no evidence for the jury that the second parcel had been warranted to be *Skirving's Swedes*, the invoice describing the seed merely as 24½ quarters of turnips. The learned Judge overruled both objections; and the jury found a verdict for the plaintiffs for the value of the seed, leave being reserved

to move to reduce the damages by the value of the *Queen's Bench*.
second parcel, if the Court should think there was no _____
evidence for the jury of that parcel having been sold
under a warranty of its being *Skirving's Swedes*.

ALLAN
v.
LAKE.

Hoggins now moved accordingly, and also for a new trial on the ground of misdirection upon the first count. First, the Lord Chief Justice misdirected the jury in laying down, as matter of law, that the statement in the sold note amounted to a warranty of the seeds being *Skirving's Swedes*. It was no more than a mere description of the article sold. In *Budd v. Fairmaner* (*a*) a receipt for a horse sold, describing it as "a grey four year old colt, warranted sound in every respect," was held not to amount to a warranty as to the age. Even supposing the sold note to amount to a representation that the article sold was of a certain description, that would not necessarily be a warranty; *Chandelor v. Lopus* (*b*), *Poucer v. Barham* (*c*); nor could the plaintiff recover on that representation unless it were false to the knowledge of the defendant. In *Ormrod v. Huth* (*d*), where cotton was sold on a representation that the bulk corresponded with the sample, no actual warranty being given, and the cotton proved to be of inferior quality, it was held that an action for a false and fraudulent representation could not be maintained without shewing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it. In the present case there was no evidence of fraud or mala

(*a*) 8 *Bing.* 48.

(*b*) *Cro. Jac.* 4.

(*c*) 4 *A. & E.* 473.

(*d*) 14 *M. & W.* 651.

Volume XVIII. fides on the part of the defendant, or of his knowledge
1852. that the representation made by him was false. The

ALLAN
v.
LAKE.

question whether, in this case, the sold note contained a warranty or not depended upon the question, which should have been left to the jury, whether the statement of the seed being *Skirving's* was treated by the plaintiffs as material or not. Had the jury found that it was, and that the seed was not *Skirving's*, then, and not till then, it was competent for the Judge to say that the statement amounted to a warranty. If, indeed, the sold note had contained the words "*warranted Skirving's*," the Judge would have been justified in construing the contract without the assistance of the jury, and in directing them that the note amounted to a warranty, and that the only question for them was whether or not the seed was *Skirving's*. Again, supposing the jury to have found that the question whether the seed was *Skirving's* was not regarded by the plaintiffs as material to the value of the contract, a further question for their consideration would have been, whether the seed was turnip seed, and of merchantable quality; *Gardiner v. Gray*(a). Possibly the plaintiffs would have considered the statement in the sold note to have been complied with if the seed had been of a description equal to *Skirving's*, although it were not actually *Skirving's*. The language of the breach in the declaration is material as to this. It avers that the seed was not *Skirving's* turnip seed, "but of another and different kind, and *inferior to and less valuable than, Skirving's Swedes* turnip seed." The substance of the issue here is, not that the seed was not *Skirving's*, but that it was inferior and less valuable.

(a) 4 *Campb.* 144.

Edge v. Pemberton (a) shews how a breach averred in this manner narrows the issue.

Queen's Bench.
1852.

Next, as regards the second parcel of seeds, the defendant is clearly entitled to a verdict; for there was no warranty at all events of that parcel. There was no sold note, but merely two invoices which described the seed as "24½ quarters of turnips." [Lord *Campbell* C. J. The defendant's agent stated the second parcel to be of the "same stock" as the first parcel, which was represented to be *Skirving's*. That was evidence for the jury that the second parcel also had been warranted to be *Skirving's*.] The contract was contained in the invoices, and could not be varied by verbal evidence.

ALLAN
v.
LAKE.

COLERIDGE J. I think there is no ground for a rule in this case. As regards the first parcel, there is no doubt that the statement in the sold note, that the seed was *Skirving's Swedes*, was made by the defendant part of the contract. Then, is that statement a warranty or a mere representation? I think it is a warranty. If it had been limited to an assertion that the seed was turnip seed, that would without doubt be a warranty of the seed being turnip seed. And, in like manner, when the defendant described the seed as *Skirving's*, he undertook that it should answer that description. Then, as to the second parcel, I think there was evidence for the jury of a warranty that the seed was *Skirving's*. If, as has been contended, the invoices formed the whole contract, there would have been no warranty to that effect. But the invoices were not the contract. It was proved that the defendant's agent stated that the second

Volume XVIII. parcel of goods was to be of the "same stock" as the
1852.

ALLAN
v.
LAKE.

existence of a previous contract. Then, if we look at the fact of the sale of the first parcel as *Skirving's Swedes*, and add to this the defendant's statement that the second parcel was to be of the "same stock," we must say that it was a question for the jury whether there was not a warranty, as to that second parcel, that the seed should be *Skirving's*.

ERLE J. I am of the same opinion. As to the first parcel of seeds, I think there was clearly a warranty. The question is, whether the vendor did not contract to sell and deliver seeds that should answer the description of *Skirving's Swedes*. The statement that the seeds were *Skirving's* was, in one sense, mere matter of description: but it was a description of a known article of commerce; and the defendant was not at liberty to substitute another sort of turnip seed which did not answer that description. He could not vary from that contract as regarded the seeds being *Skirving's* any more than he could with regard to their being *Swedes*. As to the second parcel, the question is, what was the denomination of the article sold. The contract was verbal; and it was for the jury to say if it was intended by the parties to import into the contract the assertion by the defendant's agent that the second parcel of seeds should be of the same stock as the first, namely, that they should be *Skirving's Swedes*. When a vendor gives a description of the properties of an article, it is a question for the jury whether such description is a mere commendation of the article, or a direct representation that he sells it as being the particular article

described. The invoices did not, as has been contended, constitute the contract: an invoice assumes a pre-existing contract, which, in the case of the second parcel, was a verbal one only.

Queen's Bench.
1852.

ALLAN
v.
LAKE.

CROMPTON J. I concur with the rest of the Court upon both points. With respect to the second parcel, the fact of there being a previous contract for a parcel of *Skirving's Swedes*, and the fact that the second parcel of seed was stated to be of the same stock as the first, were evidence for the jury of an intention by the parties to the contract that the second parcel should be *Skirving's Swedes*. The contract was complete before the invoices were delivered. No doubt, if a contract is in writing it cannot be varied by evidence of a further verbal agreement. Here the contract was verbal only: the invoices formed no part of it. And, even if the contract be in writing, where the goods turn out to be of inferior quality to the sample, the purchaser has, on the authority of *Meyer v. Everth* (a), a remedy by action on the case for a deceitful representation, although the sold note contain no reference to the sample.

LORD CAMPBELL C. J. As regards the first parcel, I adhere to the opinion which I expressed at the trial, that the statement in the sold note amounted to a warranty that the seed was *Skirving's Swedes*. I also agree with the rest of the Court in thinking, with respect to the second parcel, that there was evidence for the jury of the defendant having warranted them

(a) 4 Campb. 22.

Volume XVIII. also to be *Shirving's Suedes*. It is clear that the invoices
1852.

ALLAN
v.
LAKE.

did not form the contract. There was a previous verbal contract for the sale of the second parcel; and, the defendant's agent having stated that the second parcel was of the same stock as the first, that statement became part of the contract.

Rule refused.

Tuesday,
May 25th.

Sir LAWRENCE VAUGHAN PALK, Baronet,
against SHINNER.

Under stat.
2 & 3 W. 4.
c. 71, ss. 7., 8.,
the time during
which the
servient tene-
ment has been
under lease for
a term exceed-
ing three years
is to be exclud-
ed from the
computation of
a forty years'
enjoyment, but
not from the
computation of
an enjoyment
for twenty
years.

CASE. (Action commenced 1st September 1851.) The declaration stated that one *James Soper*, before and at the time &c., was possessed of a certain messuage &c., and appurtenances, the reversion of and in the same then and still belonging to plaintiff; that, before and at the time of the committing &c., the plaintiff, the said *J. S.*, and all tenants and occupiers of the aforesaid messuage, of right "have had and used, possessed and enjoyed, and still of right ought to have and use, possess and enjoy, a certain way, to wit for himself and themselves, and his and their servants, on foot, and with horses," &c., "and with carts and other carriages, every year and at all times" &c., "at his and their free will" &c., "from and out of the said messuage or tenement, farm, lands, hereditaments and premises, unto and into, through, over, across and along a certain other close" &c., "and, from and out of the same, unto and into a certain common public highway, to wit" &c., "and from thence back again," from the said highway,

unto, into &c., the last mentioned close, unto and into the said messuage &c., "for the more convenient occupation of the same." Breach: that defendant, wrongfully intending to injure plaintiff in his said reversionary estate and interest, &c., heretofore, to wit on 1st *June* 1851, and whilst the same was so in the possession and occupation of *J. Soper*, and whilst plaintiff was so interested as aforesaid, injuriously, wrongfully, &c., against the will of plaintiff, greatly and permanently encroached upon, encumbered and obstructed the said way, to wit by placing blocks of stone &c., and hath so continued such obstruction from thence hitherto, whereby the reversion of plaintiff is greatly and permanently injured and lessened in value.

Queen's Bench.
1852.

PALK
v.
SHINNER.

- Pleas: 1. Not guilty. Issue thereon.
2. That plaintiff, at the said time when &c., did not of right have or use, possess or enjoy the said way, in manner &c. Issue thereon.

On the trial, before *Erle J.*, at the last *Devonshire* Spring Assizes, the plaintiff proved the interruption, and gave evidence to shew a user of the way for twenty years. It appeared that the land, over which the right of way was claimed, had been demised in 1831 for a term of fourteen years, and again, in 1838, by a fresh lease, for a term of eight years, ending in 1846. No resistance had been made to the user at any time during or after the determination of the leases. The learned Judge, as to the user, left it to the jury to say whether or not the plaintiff had enjoyed the right of way from time immemorial or for twenty years, as of right; and, as to the twenty years, he told them that the fact of such lease having existed during part of that period would not defeat the plaintiff's right of user, under stat.

Volume XVIII. 2 & 3 W. 4. c. 71. The jury found that there had been
 1852. a twenty years' user, and gave a verdict for the plaintiff.
 PALK
 v.
 SHINNER. *Kinglake* Serjt., in last *Easter* Term, obtained a rule
 Nisi for a new trial, on the ground of misdirection.

Crowder and *Collier* now shewed cause. The question is whether, under stat. 2 & 3 W. 4. c. 71., in establishing a user for twenty years as against the reversioner of the servient tenement, the time during which such tenement was on lease for any term of more than three years is to be excluded from the computation of the twenty years' user. This point has not been raised before. It depends upon the construction of sects. 7 and 8 of the Act, taken in connexion with sect. 2. The object of sect. 2 is to give to a user of twenty years the same effect as that of a custom, a prescription or a grant, but providing that the claim by such user shall not be defeasible by proof of origin at some time prior to the twenty years; and to make the right arising from a user of forty years absolutely indefeasible, except where such right has been enjoyed "by some consent or agreement expressly given or made for that purpose by deed or writing." Sect. 7 provides, among other things, that the time during which any person, otherwise capable of resisting any claim to a right of way, shall have been or shall be a tenant for life shall be excluded in the computation of the "periods hereinbefore mentioned," except in cases where the right or claim is by the Act declared to be absolute and indefeasible. Sect. 8 provides "that when any land or water upon, over, or from which any such way or other convenient (a)

(a) Probably a misprint for "convenience," or "easement." See *Wright v. Williams*, *Tyr. & Gra.* 375. 390.; *Gale on Easements*, p. 103. (Ed. 2).

watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof." Now, first, even supposing that the intention of sect. 8 was to exclude a tenancy for years in the computation also of an user for only twenty years, no such exclusion could be made here, inasmuch as the reversioner has not resisted the claim within the three years directed by the statute. But, secondly, sect. 8 does not admit of such a construction. The only authority in support of it is an observation of *Parke B.* in *Bright v. Walker* (*a*). But that was an obiter dictum only; and no reason is given for the position laid down. [*Crompton J.* The learned Judge there said that a life tenancy must, à fortiori, be excluded from an user of twenty years: I should rather have thought the intention of the statute had been to controul only that description of user which is the nearest to being indefeasible.] That would appear to be the right construction. In *Bright v. Walker* (*a*), moreover, the tenancy which was excluded was a life tenancy, not a tenancy for years. And the tenancy had continued up to the time of the

Queen's Bench.
1852.

PALK
v.
SHINNER.

(*a*) 1 C. M. & R. 211. S. C. 4 Tyr. 502.

Volume XVIII. obstruction for which the action was brought: here it
1852. expired three years before.

PALK
v.
SHINNER.

Kinglake Serjt. and *Montague Smith*, contra. There can be no doubt as to the construction of sect. 7, which expressly directs a life tenancy to be excluded in the computation of any of the periods thereinbefore mentioned (one of which is a twenty years' user of a right of way) except where the right or claim is by the Act declared to be indefeasible, one of which exceptions is a forty years' user of a right of way. As regards that exception, sect. 8 provides that a life tenancy is to be excluded in the computation of it only if the claim be resisted by the reversioner within three years after the determination of the term. The intention, therefore, clearly is to exclude a life tenancy absolutely in the case of a twenty years' user, and conditionally in the case of a forty years' user. That is the view taken by the Court of Exchequer in *Wright v. Williams* (a). And *Wightman* J., in *Pye v. Mumford* (b), appeared to be of opinion that the construction in favour of the exclusion of a tenancy for a term of years from the computation of a thirty years' user, though not expressly directed by the Act, was correct. The statute declares that a user for twenty years may still be defeated by any of the old methods except proof of enjoyment for a less period than from time immemorial: it may therefore be defeated, as before, by shewing that the owner of the servient tenement had not the fee during the whole of the twenty years. The observations of *Wightman* J. in *Pye v. Mumford* (b) are in accordance

(a) 1 *M & W.* 100; *S. C. Tyr. & G.* 375.

(b) 11 *Q. B.* 666. 672.

with this view. [Lord *Campbell* C. J. Would an old prescriptive right be so defeated?] If there had been a succession of leases, and no evidence of user before such succession, the jury could not, before the Act, have been directed to presume the prescriptive right against the owner in fee. [*Crompton* J. Suppose the owner of the inheritance had consented by parol.] It has been held that proof of a written parol licence will defeat a forty years' user, and proof of a mere verbal licence a twenty years' user; *Tickle v. Brown* (*a*), *Beasley v. Clarke* (*b*). [Lord *Campbell* C. J. Assuming that sect. 8 applies to a user for twenty years, what answer is there to the objection that no resistance has been made by the reversioner, in the present case, within three years after the determination of the lease?] That condition in sect. 8 applies only to the case of a forty years' user, and was introduced for the purpose of fixing a time within which the absolute right might be defeated.

Lord **CAMPBELL** C. J. I am of opinion that the plaintiff is entitled to our judgment. I think that there was evidence from which the jury might find that he was entitled to claim a right of way under sect. 2 of stat. 2 & 3 W. 4. c. 71. I do not say that the evidence was conclusive; but it was sufficient to justify their finding; and that finding ought not to be disturbed unless the plaintiff's claim is defeated by sect. 8. I am of opinion that it is not. The period during which the land over which the right of way is claimed has been

(*a*) 4 *A. & E.* 369.

(*b*) 2 *New Ca.* 705.

Volume XVIII.
1852.

PALK
v.
SALISBURY.

leased for a term exceeding three years is not, under that section, to be excluded from the computation of a twenty years' enjoyment, though it is, no doubt, to be excluded from the computation of an enjoyment for forty years. Sect. 7 excludes certain times, including that of a tenancy for life, but not that of a tenancy for years, from the computation of the "periods" thereinbefore "mentioned;" and a twenty years' enjoyment is one of those periods. But sect. 8 provides for the exclusion of certain other times, among which is a tenancy of more than three years, not from the periods thereinbefore mentioned, but from one particular period only, expressly mentioned, namely, that of an enjoyment for forty years. It is clear, therefore, that it was not intended to exclude them from the computation of an enjoyment for twenty years. Great reliance was placed upon *Bright v. Walker*(a); but, on examination into that case, it appears that there was no necessity for the Court to give any opinion as to the effect of sect. 8; for the right of way there claimed was clearly destroyed, under sect. 7, by reason of a tenancy for life. But, even supposing sect. 8 to apply to a twenty years' enjoyment as well as to an enjoyment for forty years, the right by enjoyment in the present case is not destroyed, inasmuch as the condition, that the claim shall be resisted by the reversioner within three years after the determination of the tenancy for years, has not been complied with.

COLERIDGE J. Putting out of consideration sects. 7 and 8, there was clearly evidence for the jury of a twenty

(a) 1 C. M. & R. 211. S. C. 4 Tyr. 502.

years' user, as of right, before the commencement of the action. That being so, we must look to sects. 7 and 8 to see whether that period of twenty years is to be shortened by excluding the period during which the tenancy for years existed. Now, sect. 7 applies in terms to a twenty years' enjoyment, for the purpose, not of defeating the right, but of excluding certain periods from the computation of the twenty years. But a tenancy for years is not one of those periods, although a life tenancy is. Then, sect. 8 does exclude a tenancy for years, but excludes it only from the computation of a forty years' enjoyment. There being one section applicable to a twenty years' enjoyment, and another expressly confined to a forty years' enjoyment, it would be unreasonable to import the latter into the former, and make sect. 8 apply to a twenty years' enjoyment also. But, even if it did so apply, the tenancy for years cannot be excluded in the present case, the reversioner having made no resistance within three years from the determination of the term.

Queen's Bench.
1852.

PALK
v.
SHINNER.

ERLE J. If this case had arisen before the statute, there would have been good evidence to go to the jury of a user as of right for twenty years, notwithstanding the existence of the tenancy for years. And the question is still to be left to the jury in the same way; for the statute makes no difference in the various modes of defeating the user, except as it provides that it shall not be defeated by proof of origin at some time prior to the twenty years. The question then arises whether, under sect. 8, the tenancy for years is to be excluded from the computation of twenty years' enjoyment. That section applies expressly to the computation of an

Volume XVIII.
1852.

PALK
v.
SHINNER.

enjoyment for forty years; and it would be contrary to all rules of construction to hold that it applies also to the computation of an enjoyment for twenty years. The only possible ground for such a conclusion is found in *Bright v. Walker* (*a*). But there the question was as to the exclusion of a tenancy for life, and the Court was clearly right in holding that such tenancy must be excluded from the computation of a twenty years' enjoyment. It is so excluded under sect. 7; and I do not see that its exclusion is made more clear by sect. 8. But I do not think the learned Judge ever meant to say that a tenancy for years must be excluded from the computation of an enjoyment for twenty years (*b*).

Rule discharged.

(*a*) 1 C. M. & R. 211. S. C. 4 Tyr. 502.

(*b*) *Crompton J.* was absent.

Wednesday,
May 26th.

The QUEEN against AVERY.

Under stat.
5 & 6 W. 4.
c. 76, s. 32.,
which requires
the voting
paper at an
election of bo-
rough coun-
cillors to be
*signed with the
name of the
burgess voting,
the party's
usual signature*

is sufficient; and it is no valid objection that the Christian name is denoted only by an initial.

Such paper is correct according to sect. 32, if the place in respect of which the party votes, and for which he appears to be rated on the burgess roll, be described according to its actual situation, though the description may vary in terms from that on the burgess roll.

QUO warranto for exercising the office of a councillor of the borough of *Barnstaple*. Plea, that, defendant being a person qualified, and a candidate, for the said office at an election of three councillors held on November 1st 1851, it was then ascertained that he was one of the three persons having the greatest number of votes; and he was deemed to be and was then and there

elected &c.; and that his name was published accordingly, and he subscribed the declaration &c.: verification. Replication, denying that it was ascertained &c. in manner and form &c.: or that defendant was one of the three persons having the greatest number of votes, in manner &c.: or that he was elected a councillor &c. in manner &c. Issues to the country were joined on these several traverses.

On the trial, before *Erle J.*, at the *Devonshire* Spring assizes in this year, it appeared that, at the close of the election, *Avery* stood third upon the poll, and one *King* fourth, the numbers declared being for *Avery* 282, and for *King* 274; but it was contended that *King* had more legal votes than *Avery*. The following among other objections to the votes given for *Avery* were relied upon for the prosecution.

1. That the Christian name or names of the voter were designated on the voting paper by initials only; as "*J. S. Clay*;" "*A. T. Powning*." The Burgess roll contained the names "*John Sherard Clay*" and "*Ambrose Toop Powning*." *Erle J.*, referring to *Regina v. Hartlepool* (a), held these signatures sufficient.

2. That a voter who resided in a portion of *Pilton* parish, forming part of the North ward, signed his voting paper "*John Cann, Pilton*;" whereas in the Burgess roll of voters for the North ward his rated property was described (under the head of "*Pilton*") as follows: "*Cann, John. House: In the Street*." Another voter, whose rated property was similarly described on the roll, signed himself "*James Cooksley, Pilton Street*." It appeared that *Pilton* contained more than one street,

Queen's Bench.
1852.

The QUEEN
v.
AVERY.

Volume XVIII. but that the place in which these persons lived was known in *Barnstaple* as “*Pilton Street*” or “*The Street, Pilton.*” *Erle J.* held the paper sufficient.

*The Queen v.
Avery.*

Both objections applied to several votes.

A verdict having been found for the defendant, *Slade*, in last *Easter* term, moved (by leave reserved) that a verdict might be entered for the Crown, on the ground that the above stated objections ought to have been held fatal. He relied also on some others, which it is unnecessary to set forth.

Crowder and *Taprell* now shewed cause. As to the first class of objections. Stat. 5 & 6 W. 4. c. 76. s. 32. directs that the voting paper shall contain the Christian and surnames of the persons voted for, but requires only that it be “signed with the name of the burgess voting.” [Lord *Campbell* C. J. Would the surname alone be sufficient?] At least the surname with the initials of the other names, or contractions of them, according to the party’s usual mode of signing, would satisfy the intention of the Legislature. The present form is, at any rate, only a “mismother or inaccurate description,” which, by sect. 142 of the same statute, does not vitiate, “provided that the description,” of person or place, “be such as to be commonly understood.” [*Coleridge* J. Is this a description at all?] If it serves to identify the party, its purpose is answered. And, under this Act, sect. 34, the voter who delivers the paper, may be asked if he is the person whose name is signed to it (a). A will or a bond

(a) It was also urged that the particular voters in this case were well known in *Barnstaple*; but it was answered, and finally admitted, that the sufficiency of the signature was decided upon at the trial purely as a matter of law. See *Regina v. Hammond*, 17 Q. B. 772, 783, 4.

would be sufficiently signed though the Christian names of the party executing were denoted only by initials. *Queen's Bench.*
1852.

[*Coleridge* J. It will be said that "name" in this Act must mean more than surname. Lord *Campbell* C. J.

The QUEEN
v.
AVERY.

You are not driven to contend that the surname alone would be sufficient. It may be said that the initials are a short way of stating the Christian name (*a*).] Where the Legislature requires Christian names to be given in full, express words to that effect are used, as in the Parliamentary Reform Act, 2 & 3 W. 4. c. 45. s. 38., the Act for Registration of voters &c., 6 & 7 Vict. c. 18. s. 13., and the Act as to duties on newspapers, 6 & 7 W. 4. c. 76. s. 14. Under the Uniformity of process Act, 2 & 3 W. 4. c. 39. s. 12., which requires writs to be indorsed with the "name and place of abode" of the attorney suing them out, it has been held that the Christian name need not be signed, and that the name of a firm is sufficient; *Pickman v. Collis* (*b*), *Hartley v. Rodenhurst* (*c*). So under stat. 24 G. 2. c. 44. s. 1., which directs that notice of action against a justice shall be indorsed with the attorney's name, it was held that the surname at length, and an initial in place of the Christian name, were sufficient; *Mayhew v. Locke* (*d*), *James v. Swift* (*e*). *Holroyd* J. in the latter case thought that the word "name" did not even require the Christian name to be denoted at all; a view which appears to have been also taken by *Parke* B. in *Roberts v. Williams* (*g*). And *James v. Swift* (*e*) was recognized as an authority in

(*a*) Sir F. *Thesiger*, for the relator, admitted, in the outset of the argument, that a contraction denoting the Christian name (as *Sam'l.* for *Samuel*) might suffice.

(*b*) 3 *Dowl. P. C.* 429.

(*c*) 4 *Dowl. P. C.* 748.

(*d*) 7 *Taunt.* 63.

(*e*) 4 *B. & C.* 681.

(*g*) 2 *Cro. M. & R.* 561. 562. *S. C.* 5 *Tyr.* 583. 584.

Volume XVIII. *Smith v. Brown* (*a*), where the bill of two attorneys was held to be properly signed within stats. 3 *Ja. 1. c. 7. s. 1.*

*The QUEEN
v.
AVERY.*

(which requires subscription with the attorney's "own hand and name") and 2 *G. 2. c. 23. s. 23.*, though the surnames only appeared. Designation of parties in pleading by initials in place of the Christian names is sanctioned by the Law amendment Act, 3 & 4 *W. 4. c. 42. s. 12.* The admissibility of initials in cases not falling within that section has been much discussed; and a distinction has been drawn between a consonant initial and a vowel initial (*b*). [Lord *Campbell C. J.* That has been questioned here (*c*).] That objections founded on misnomer are not favourably considered, where there is sufficient certainty as to the person, appears by Sir *Moyle Finch's Case* (*d*). *Regina v. Hartlepool* (*e*) is an authority a fortiori: there a notice of claim to be put upon the burgess list had been served under stat. 5 & 6 *W. 4. c. 76. s. 17.*, in the name of *A. W. Dobing*: the schedule (D) to that Act, referred to by sect. 17, gives a form which the claim ought to pursue, and which requires the "Christian and surname of each claimant:" yet *Erle J.* held that the claim had been improperly rejected on account of the initials, and granted a mandamus, under stat. 7 *W. 4. & 1 Vict. c. 78. s. 24.*, to insert the name.

Sir *F. Thesiger*, Attorney General, *Slade* and *Montague Smith*, contrà. The intention of the Legis-

(*a*) 1 *Cro. & J.* 542. *S. C. 1 Tyr.* 486.

(*b*) See *Lomax v. Landells*, 6 *Com. B.* 577.; *Kinnersley v. Knott*, 7 *Com. B.* 980.

(*c*) *Regina v. Dale*, 17 *Q. B.* 64.

(*d*) 6 *Rep.* 63 a. 65 b.

(*e*) 2 *Lowndes, M. & P.* 666.

lature in stat. 5 & 6 W. 4. c. 76. was that elections *Queen's Bench.*
should be conducted with facility and certainty, for which

1852.

purpose it was essential that the voter's name should be inserted at full length in his paper, so that he might with the greatest ease be identified, not merely in small boroughs where the party might be recognized by a slight description, but in larger ones, containing great numbers of persons unknown to each other. The voting paper ought to correspond with the burgess list, which, by sect. 15, and schedule D. there referred to, is required to shew the Christian name and surname at full length, so as to leave no doubt of the identity. This made it unnecessary to repeat an express direction on the same head in sect. 32, though it enacts that the paper shall contain the Christian names and surnames of the candidates voted for, no previous intimation having been given on that subject. The paper does not of itself identify the voter, except by the words appearing on it. [Lord *Campbell* C. J. The Act directs only that the paper shall be signed with the burgess's name. It does not even say that he himself shall sign it.] He might be unable to do more than make his mark; but that would not satisfy the Act. [Lord *Campbell* C. J. A signature according to common usage seems to be all that is required.] It is suggested that questions may be put to the voter under sect. 34: but that is only if two electors require it; and the burgesses do not see the voting paper at the time of the election. It is evident that great uncertainty must arise from the use of initials where several Christian names begin with the same. Suppose the name on the burgess roll to be *Joseph Smith*; a voter coming up with a paper signed *J. Smith* may be asked the three questions prescribed in sect. 34,

The QUEEN
v.
AVERY.

Volume XVIII. and no others : he may reply, truly or not, that he is the person whose name appears as *Joseph Smith* on the burgess roll : a second and a third voter with papers

The Queen v.

Avery.

similarly signed may give the same answer ; and it will be impossible to determine, from the papers, whose vote ought to stand. [Lord *Campbell* C. J. The same difficulty would arise if there really were two persons named *Joseph Smith*, giving full signatures.] The enactment in sect. 142, that no "mismomer or inaccurate description" shall prejudice, provided "the description" of the "person" &c. "be such as to be commonly understood" seems applicable to cases where some "description" is to be given beyond the mere name of the party. The defect here is not a mismomer, but a want of name ; it is not even the case of a contraction, as *Thos.* for *Thomas*, which might be sufficient. It is not an inaccurate description, but a failing to describe. The clause was intended to cure something wrong : here the designation, as far as it goes, is right. [Lord *Campbell* C. J. May not it be said that a defective description is an inaccurate description?] *Regina v. Hartlepool* (a) differed entirely from this case. There a burgess had sent his notice of claim to the town clerk, giving initials only for the Christian names. The case states that, for this defect in the notice, the mayor and assessors refused to enter the name in the burgess roll. But it does not appear that the town clerk may not have sent in the full names, which were generally known in the borough ; and, if he did so, it was not the duty of the mayor and assessors to look at the notice of claim. The town clerk, under sects. 17 and 18, produces, not the notices, but

his list of claimants; and, in the case cited, though the notice was imperfect, the clerk might have supplied the omission from evidence or from his own knowledge. The mayor and assessors themselves receive evidence, when making up their lists under sect. 18, and are to "correct any mistake or supply any omission which shall be proved to the Court to have been made in any of the said lists in respect of the name or place of abode of any person who shall be included in any such list." The notice in that case was not contrary to the direction of sect. 17, which requires only that it shall be "according to the form" in schedule (D) "or to the like effect." The argument for the defendant would shew that in the *Hartlepool* case initials for all the names might have sufficed, if they had been understood by the town clerk. The object of the statute is to ensure that the name on the voting paper shall be the same as that on the burgess list; and this is to be effected on the principles laid down by *Wilde* C. J. in *Eidsforth, appellant, Farrer, respondent* (a). "The Court would deem it to be its duty equally to avoid requiring what the statute itself does not require, as to avoid encouraging the omission of that which the statute does require; and it is essential, in the construction of this Act, especially to lay down such broad and distinct rules as may be intelligible to the minds of those whose conduct is to be guided by them." [Lord *Campbell* C. J. Besides the *Hartlepool* case there is a long list in which the name has been required by statute, but initials for the Christian names have been held sufficient.] They all stand upon grounds not applicable to a case like this,

Queen's Bench.
1852.

The QUEEN
v.
AVEAY.

Volume XVIII. where a party delivers his name for the purpose of giving validity to his own act. As to firms, the surnames of

1852.
The Queen

v.
Avery.

the partners are the name of the firm : it is known by them and not by the Christian and surnames. The simple question here is, what the Court will hold to be the "name of the burgess voting," within sect. 32 of stat. 5 & 6 W. 4. c. 76.

Lord CAMPBELL C. J. I have not been able to entertain a doubt in this case. Stat. 5 & 6 W. 4. c. 76. s. 32. directs the mode of voting by delivery of a voting paper, "such paper being previously signed with the name of the burgess voting :" and the question is, whether the papers in this case, containing the surname of the voter, and giving, for the Christian names, initials by which the voter was known in *Barnstaple*, were "signed with the name" according to sect. 32. We must give the act that interpretation which would be put upon it by any person reading it according to the grammatical construction and the ordinary force of words. The requisition is that the paper be "signed," that is, by the voter or some person for him : and what is intended to be the signing ? Clearly that it should be done in the ordinary mode in which he signs his name : and here we must take that ordinary mode to be writing the surname in full and denoting the Christian name by an initial. A testator may sign in this form ; and it is allowed in executing deeds, and in subscribing the written instruments required by the Statute of Frauds. Other instances were cited by Mr. Taprell, where signatures, not in full, but in the forms habitually used by the parties, were allowed to be sufficient, under the Uniformity of process Act, and under stat. 24 G. 2.

c. 44. In some cases the Legislature expressly requires both Christian and surnames to be written at full length; and, where that direction is for some reason introduced, it must be complied with. Here no such direction is given, either expressly, or by reference to any form as a model. It is admitted that a contraction of the name would be sufficient: what is an initial but a contraction, though less distinct than other contractions sometimes are? *Regina v. Hartlepool* (a) is applicable, and goes the full length required in this case. There the notice of claim was to be made according to a model form which gave the Christian names in full: yet my brother *Erle* held that a notice singed "A. W. Dobing" was sufficient. And by the rule, as we lay it down, all the objects of the Legislature are gained, and the election may be carried on with simplicity and propriety. Any two burgesses may require the questions to be put according to sect. 34: "Are you the person whose name is signed to the voting paper?" and "Are you the person whose name appears as A. B. on the burgess roll," "being registered therein as rated for" such and such property? and a person answering falsely would be punishable. To insist upon Christian names being given in full might often introduce confusion, and disfranchise many voters. The rule we lay down creates no difficulty. There is no occasion for referring to the interpretation clause, sect. 142, because there is not here any misnomer or misdescription: the paper is "signed with the name" according to the usual acceptation of those words.

COLERIDGE J. The question, whether or not a paper is signed by such a man, is different from the question

(a) 2 *Lowndes, M. & P.* 666.

Queen's Bench.
1852.
The QUEEN
v.
AVERY.

Volume XVIII. abstractedly put, what the man's name is. At *Eton*, 1852.

The QUEEN
v.
AVERY.

when I was asked, quid tibi nomen et cognomen? I was bound to give all my names: but the statute, in this clause, does not make such an inquiry of the voter. It is providing for a particular mode of election through the agency of voters drawn from all classes of life, and who may or may not even be able to write. It requires the voter, therefore, merely to bring a paper with his "name" "signed on it." It does not, as my Lord has observed, even oblige him to write the name. In construing such an enactment, to insist that both the voter's names should be written at length would be adopting a construction against the franchise, which would be contrary to a universal rule. We need not call to aid sect. 142, except as shewing the intention of the Legislature to favour the franchise: in this respect the provision, that misnomer or misdescription shall not prejudice, gives the key to other enactments. Using it so, if we are asked what is meant by "signed with the name" in sect. 32, we may well answer that, if writing the surname with an initial before it is a signing in popular acceptance, that is sufficient.

ERLE J. It is a proper general rule, in considering the exercise of rights under this statute, to inquire whether, according to common understanding, the party has expressed an intention to exercise them. And I think that, where a man's surname and the initial of his Christian name are signed upon a voting paper, it is, in common understanding, signed with his name. It is unnecessary, therefore, to say anything as to sect. 142.

CROMPTON J. We must construe sect. 32 according

to common parlance. When signing is spoken of, the ordinary understanding is that the signature should be in the form in which a man usually writes his name. This act itself shews that where more particularity is wanted the Legislature uses words requiring it.

*Queen's Bench.
1852.*

The QUEEN
v.
AVERY.

Crowder then proceeded to answer the second class of objections, but was stopped by the Court.

Slade, contrà, contended that the descriptions of residence in the voting papers were bad, because the statements differed from those on the burgess roll. [Lord *Campbell* C. J. It is immaterial how the place of abode is stated on the roll: sect. 32 requires only the name of the street, &c., where the property for which the burgess appears to be rated on the burgess roll "is situated"]. *Slade* then read the words of the second question to be put to the voter under sect. 34. [*Coleridge* J. That merely prescribes the question to be put as to the voter's identity with the person described on the burgess roll. Lord *Campbell* C. J. Clearly all that is required by sect. 32 is the name of the street or place in which the property is: and, according to the evidence here, that requisition has been complied with literally and rigorously].

The Court having decided against the relator on this objection, no other point was argued.

Rule discharged.

Volume XVIII.
1852.

HOWES against BARBER.

If a party to a cause be examined on his own behalf under stat. 14 & 15 Vict. c. 99. s. 2., the Master may allow, in taxation, for his maintenance during the time of his detention for the purpose of giving evidence, as in the case of any witness, if his testimony, in the Master's opinion, was material and necessary, and if he attended for the purpose of being examined as a witness and not merely to superintend the cause.

A RULE nisi was obtained in the last Term for a review of the Master's taxation in this case.

The action was brought to recover wages due to the plaintiff as master, from the defendant as owner, of a ship, for bringing her home from *Valparaiso*. The writ was issued *September* 29th, 1851; and the plaintiff remained in *England*, unemployed, and solely for the purpose of giving evidence in the cause, from that time till *January* 1852, when the cause was tried. On *November* 8th the defendant obtained an order for a month's time to plead; and it was a term of the order that the parties should be at liberty to examine any witnesses before issue joined. The plaintiff was examined as a witness on the trial; and a verdict was found for him. He was, as appeared on affidavit before the Master, a material and necessary witness. On taxation, the plaintiff claimed costs, as a witness, for his detention. The allowance was resisted on several grounds, and, among them (as appeared by affidavit in support of the present rule), "that a plaintiff cannot be allowed for his loss of time, but for his necessary expences in attending the trial, only;" and that the plaintiff might have avoided a detention by tendering himself to be examined under the order. The master, after calling for special affidavits of increase, allowed as follows: "To the plaintiff for his detention from the 13th day of *September* 1851 to the 13th day of *January*, 1852, four months, 10*l.* per month. Forty pounds (a)." Application was

(a) The Master (*Turner*) informed the Court that he made the allowance not for loss of time but as subsistence money according to the plaintiff's condition in life, as master of a merchant vessel trading to foreign countries. See *Mount v. Larkins*, 8 *Bing.* 195.

made to *Crompton J.* at Chambers for an order to review; *Queen's Bench.*
and the learned Judge referred the matter to the full 1852.
Court. In the same term (a),

HOWES
v.
BARBER.

Lush shewed cause. A party to a cause, being now competent to give evidence on his own behalf, is entitled to compensation for his attendance like other witnesses. The Master has decided here that the plaintiff's evidence was material. [Lord *Campbell C. J.* Suppose it was material but not indispensable]. Still he would be entitled. It is well known that, since the Act 14 & 15 Vict. c. 99., enabling parties to give evidence for themselves, a party is discredited with the jury if, knowing anything of the facts, he does not personally appear. In the county Courts, allowance for time is made to parties, as to other witnesses. It is contended on the other side that the plaintiff might have offered himself as a witness under the order of November 8th. But this was a point entirely for the consideration of the Master; and his exercise of discretion upon it is decisive. In *McAlpine v. Poles* (b) the Master allowed the plaintiff for witnesses brought from abroad: it was urged that they might have been examined on interrogatories under stat. 1 W. 4. c. 22.: but Lord *Lyndhurst C. B.* said: "It is frequently very desirable that a party should be able to have his witnesses examined *vivâ voce*. It appears to us, that the allowance of such witnesses is still a matter in the discretion of the Master, in each particular instance, just as it was before the late Act." And, after conference with the Judges of the other Courts, he said:

(a) May 8th. Before Lord *Campbell C. J.*, *Erlc* and *Crompton Js.*

(b) 1 Cro. & M. 795. S. C. 3 Tyr. 871.

Volume XVIII. 1852. "They agree with us in the opinion which we have formed, that the Act of Parliament makes no difference in this respect. We think that the matter is in the discretion of the Master, subject to be reviewed by the Court; and we think, that, in this particular instance, the discretion was properly exercised."

Unthank, contrà. The result of this case will be important, as, if the plaintiff establishes his right to costs, no one will ever advise a party to be absent from a trial where he might give evidence to confirm that of other witnesses. Undoubtedly costs are to be assessed according to the discretion of the Court; this is the effect of the statute of *Gloucester*, 1 stat. 6 Ed. 1. c. 1. s. 2., as to plaintiff's costs; and, in stat. 23 H. 8. c. 15. s. 1., giving costs to defendants, "the discretion of the Judge or Judges" is expressly referred to. But the Courts do not, in the exercise of that discretion, award costs to a party simply for attending to his own business; for doing on his own behalf what is the business of an attorney. His attendance at consultation may be more important than his presence as a witness in Court; yet no allowance has ever been claimed for such attendance. Now in this case nothing appears which can enable the Court to say that the plaintiff did not remain in *England*, and attend the trial, as a party managing his own cause. As to the materiality of the testimony, it must be admitted that the Master's judgment must decide.

Cur. adv. vult.

Lord CAMPBELL C. J., in this term (*June 2d*), delivered the judgment of the Court.

We are of opinion that the Master's taxation of *Queen's Bench*.
costs in this case was proper. No doubt, the practice _____
of allowing costs to the successful party in respect of
his having been a witness for himself may lead to incon-
venient consequences; but we do not think we can lay
down a rule that such costs can never be allowed. The
party is now by law admitted as a witness; he may be a
material and necessary witness; and his attendance may
not only obtain justice for himself, but may lessen the
expence which would otherwise fall upon the opposite
party, by obviating the necessity for requiring the attend-
ance of other witnesses, or for issuing a commission to
examine witnesses abroad.

HOWES
V.
BARBER.

The reasonable expences to which the plaintiff is put
by being obliged to attend and be examined as a witness
to enforce payment of a just demand, or to seek redress
for an injury, should be thrown on the wrong doer.
Again, if an unfounded action is brought, and the evi-
dence of the party improperly sued is necessary for his
defence, he is not indemnified if his own expences as a
witness are not allowed to him.

Here the plaintiff, the captain of a ship, had a demand
against the owner for wages; and this he could make out
only by his own evidence, or by sending out a commission
to a distant country. Remaining in *England* for the
purpose of being examined at the trial, the Master has
made him the like allowance for maintenance from the
service of the writ till the day of trial which would
have been made to a third person as a witness under
similar circumstances. *Berry v. Pratt* (a) and other
decisions shew that to a third person so remaining in

(a) 1 B. & C. 276.

Volume XVIII. this country as a witness such an allowance would be
1852.

HOWES
v.
BARBER.

proper: and, the Legislature having been pleased to permit the parties to be examined in their own behalf, we cannot say that the expence of the successful party who has been so necessarily examined should not fall upon the party who, resisting a legal demand, or making an unlawful one, has caused this necessity. In the somewhat analogous case of an indictment removed by certiorari where the defendant is liable to costs, if the prosecutor be a material witness and has been examined, it has been usual to allow his expenses, though not to make him any compensation for loss of time.

We must trust to the intelligence and the vigilance of the taxing officers to detect and to frustrate attempts that may be made to swell costs unnecessarily under the pretext that the parties were material and necessary witnesses. The simple fact of their being examined as witnesses must by no means be considered sufficient to establish a claim for their expenses as witnesses; and, if it appears that their attendance was unnecessary, or that they attended to superintend the conduct of the cause, the claim ought to be rejected.

In the present case the plaintiff seems to have acted with perfect good faith, and to have been necessarily detained in *England* that he might be a witness. Therefore this rule that the Master should review his taxation must be discharged.

Rule discharged (a).

(a) See *Dowdell v. Australian Royal Mail Company*, 3 E. & B. 902.

Queen's Bench.
1852.

AMOTT *against* HOLDEN.

Saturday,
June 12th.

DEBT on bond. (Action commenced 24th June 1851.) The first count stated that defendant, on 9th June 1828, by his writing obligatory sealed with his seal (profert), acknowledged himself to be held and firmly bound to the plaintiff in 300*l.*: The second count alleged that defendant, on 2d June 1829, by his certain other writing obligatory &c. (profert), acknowledged himself to be held &c. to the plaintiff in the

Declaration, on
the obligatory
part only, upon
two bonds,
dated in 1828
and 1829
respectively.

Pleas : 3.
That the
alleged causes
of action did
not accrue
within twenty
years. 4. That
after the
making of

the bonds, and before the commencement of the action, defendant became bankrupt, and that the said causes of action accrued before such bankruptcy. Replication, joining issue on the fourth plea, and, to the third plea, that the said causes of action did accrue within twenty years. Issue thereon.

The plaintiff then (by enrolment on the record) set out the bonds and the conditions. The first bond stated that *J. Mather* and defendant bound themselves, and each of them, by himself, his heirs &c., to the plaintiff in the sum of 300*l.* The condition (after reciting that the said *J. M.* had agreed with plaintiff for the sale to him, for 150*l.*, of an annuity of 20*l.* to be paid to plaintiff, his executors &c., during the joint and several lives of plaintiff and his wife, and the survivor; that *J. M.* had requested defendant to join in and execute the bond, which he had agreed to do, for securing the regular payment of the annuity; and that the 150*l.* had been paid to *J. M.*) was for payment of the annuity, by *J. M.* or defendant, or their or either of their heirs &c., some or one of them, by equal half yearly payments on &c., during the joint and several lives of plaintiff and his wife, and of the survivor, and a proportionate part in case of the survivor dying between the days of payment. The second bond and condition were similarly framed for the payment, by and to the same parties, of an annuity of 10*l.* The plaintiff then suggested that, in 1851, two and a half years' arrears were due in respect of each annuity, and were still unpaid.

At the trial, it appeared that the defendant had become bankrupt in 1836; that *J. M.* had paid the annuities half yearly down to 1848, but never till after the day of payment fixed by the condition, so that there had been breaches of the condition twenty years before action, and before the bankruptcy: and that the arrears suggested by plaintiff were still due. Plaintiff had not attempted to prove as annuity creditor under defendant's bankruptcy.

Held, that a new cause of action arose upon each successive breach of the condition; that, on the record as it stood, plaintiff was entitled to prove, at the trial, breaches within twenty years; and that, on such proof, he was entitled to a verdict upon the issue on the Statute of Limitations.

Held, further, by Lord *Campbell* C. J. and *Erle* J., dissentient *Wightman* J., that defendant's liability under the bonds and conditions was that of a surety only; that *J. M.* was the principal, and grantor of the annuity: that plaintiff, therefore, could not have proved, under defendant's bankruptcy, in respect either of the penalties, or of the breaches of condition committed before the bankruptcy; and that consequently the matter pleaded and proved was no bar to the action.

Volume XVIII. sum of 150*l.*: Yet defendant had not paid the said 450*l.*,
1852.
though often requested.

A MOTT
v.
HOLDEN.

Third plea: That the causes of action in the declaration mentioned did not, nor did any or either of them, accrue to plaintiff within twenty years next before the commencement of this suit.

Fourth plea: That, after the making of the said several writings obligatory, and before the commencement of this suit, viz., on 3d *September* 1836, defendant became a bankrupt within the true intent and meaning of the statutes &c.; and that the causes of action in the declaration mentioned, and each of them, accrued to plaintiff before defendant became a bankrupt.

Replication, joining issue on the fourth plea: and, to the third plea: That the said causes of action did accrue within twenty years &c. Issue thereon. The plaintiff then set out (by enrolment on the record) the bond in the first count and its condition as follows:

Know all men &c., that we, *John Mather*, of &c., and *John Holden*, of &c., are held and firmly bound to *George Amott*, of &c., in the sum of 300*l.*, of lawful money &c., to be paid to the said *George Amott* or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves and each of us, by himself, our and each of our heirs, executors and administrators, firmly by these presents. Sealed &c. Dated 9th *June A. D.* 1828.

Whereas the above bounden *J. M.* hath agreed with the above mentioned *G. A.* for the sale to him, the said *G. A.*, of one annuity or clear yearly sum of 20*l.* to be paid to the said *G. A.*, his executors, administrators or assigns, during the joint and several lives and life of the said *G. A.* and *M. H. A.* his wife,

and during the life of the survivor of them, at or for the price or sum of 150*l.*; and the said *J. M.* hath requested the said *J. Holden* to join in and execute the above written bond or obligation, which the said *J. Holden* hath consented and agreed to do, for securing of the due and regular payment of the said annuity: and whereas the said *G. A.* hath duly paid to the said *J. M.* the said sum of 150*l.*, in good and lawful money of *Great Britain*, in full, for the purchase of the said annuity or yearly sum of 20*l.*, which he the said *J. M.* doth hereby admit and acknowledge. Now the condition of the above written obligation is such that, if either the said *J. M.* or the said *J. Holden*, or their or either of their heirs, executors or administrators, some or one of them, do and shall well and truly pay or cause to be paid unto the said *G. A.*, his executors, administrators or assigns, or as he or his executors, administrators or assigns shall direct or appoint, during the natural and several lives and life of the said *G. A.* and *M. H. A.* his wife, and during the life of the survivor of them, one annuity or clear yearly sum of 20*l.*, of lawful money current in *Great Britain*, by two even and equal half yearly payments, on the 9th day of *December* and the 9th day of *June* in every year, without any deduction or abatement whatsoever; and if the said *G. A.* and *M. H. A.*, or whichever of the two shall or may survive the other, and (a) shall afterwards depart this life between any of the half yearly days whereon the said annuity is made payable, then if either the said *J. M.* or the said *J. Holden*, or their or either of their heirs, executors, administrators or assigns, some or one of them, do and

Queen's Bench.
1852.

AMOTT
v.
HOLDEN.

(a) Sic. Apparently the "and" should be omitted.

Volume XVIII. shall well and truly pay unto the executors or administrators of the said *G. A.*, or the person legally authorized to receive the same, a proportionate part of such annuity or yearly sum of 20*l.*, according to the time which the survivor of them, the said *G. A.* and *M. H. A.*

AMOTT
v.
HOLDEN.

his wife, may happen to live after the then last yearly payment shall have become due, without any deduction or abatement, then the above written bond or obligation shall be void, otherwise the same shall remain in full force and effect."

The plaintiff then suggested that, on 9th *June* 1851, 50*l.*, being the arrears of the said annuity from 9th *December* 1848, was due to the plaintiff, and that neither the said *J. M.* nor the defendant would pay the same.

The record then set out the bond in the second count, and its condition, which were similar to those in the first, except that the penalty was 150*l.*, and the annuity was 10*l.*, to be paid half yearly, on 22d *December* and 22d *June*.

The plaintiff then suggested that, on 22d *June* 1851, 25*l.*, being the arrears of the last mentioned annuity from 22d *December* 1848, was due to the plaintiff, and that neither the said *J. M.* nor the defendant would pay the same.

On the trial, before Lord *Campbell C. J.*, at the *London* sittings after last *Hilary Term*, it appeared that the defendant had become bankrupt in 1836; that *Mather* had, from time to time, made the half yearly payments of the annuities to the plaintiff down to 1848, but that none of those payments had been made till after the day appointed in the condition, so that several breaches of the condition had, in fact, taken place more

than twenty years before the action, and before the defendant's bankruptcy. The plaintiff had not attempted to prove any claim against the defendant, in respect of the annuities, under the commission of bankruptcy. The arrears suggested by the plaintiff were proved to be still due. A verdict was found for the plaintiff, leave being reserved to move to enter a verdict for the defendant on the third and fourth pleas. *Knowles*, in last Easter Term, obtained a rule nisi accordingly. In this Term (a),

Queen's Bench.
1852.

AMOTT
v.
HOLDEN.

Montagu Chambers, Bramwell and Tompson Chitty shewed cause (a). First, as to the plea of bankruptcy. The plaintiff's claim against the defendant is not one which was capable of proof in the Bankruptcy Court; and therefore the defendant's bankruptcy and certificate are no bar to the action. In both bonds *Mather* is the principal, and the defendant is only a surety; and the annuity, under either bond, is payable during the lives of the plaintiff and his wife, and the life of the survivor: many contingencies, therefore, must have occurred before the defendant's liability under the bonds assumed the shape of a definite claim against him by the plaintiff, so as to be capable of valuation and proof according to the Bankruptcy law. [Lord Campbell C. J. The plaintiff's claim against *Mather*, under the bonds, also depended upon certain contingencies.] That is so; but his claim against the defendant was subject to an additional contingency, that of default by the principal. Until that was clearly shewn, the plaintiff would

(a) June 12th. Before Lord Campbell C. J., *Wightman* and *Erle* Js. *Crompton* J., having been counsel in the cause, took no part in the discussion.

Volume XVIII. have no claim against the defendant; and the Commissioner in Bankruptcy had no power to order inquiries to be made as to that. *Thompson v. Thompson* (*a*) is directly in point. *The Overseers of St. Martin v. Warren* (*b*) and *Goddard v. Vanderheyden* (*c*) are also authorities in favour of the plaintiff. [Lord *Campbell* C.J. May not *Mather* and the defendant be considered as joint grantors of the annuity?] Even on that supposition the Court of Bankruptcy would probably not allow the plaintiff to prove a claim against one only. [*Wightman* J. I think it would, if *Mather* and the defendant had granted jointly and severally.] The bonds here do not constitute the grant of the annuity: they recite the grant; but they operate only as a collateral security for payment, *Mather* being the principal in that security, and the defendant his surety. [*Wightman* J. Either is surety for the other. According to your argument the plaintiff could not prove his claim upon the bonds against *Mather*.] Not upon the bonds; but he could, under stat. 6 G. 4. c. 16. s. 54., prove against him as grantor of the annuity. It will probably be contended that, even if the plaintiff could not have proved a debt from the defendant in respect of the annuity, yet he might have proved a debt against him in respect of the penalty in the bond, which had been forfeited before the bankruptcy. But it is not always true that a claim in respect of a penalty on a bond forfeited before the bankruptcy of the obligor can be proved against him under the commission. It can be proved only where the payment or other benefit to the obligee which is secured to him by the obligor is

(*a*) 2 *New Ca.* 168.

(*b*) 1 *B. & Ald.* 491.

(*c*) 3 *Wils.* 262.

*Anott
v.
Holden.*

capable of valuation; *Young v. Taylor* (*a*). In the present case, the defendant being bound to pay only after total default by the principal, the plaintiff had no claim against the defendant, at the time of the bankruptcy, which was capable of valuation. The decision in *Perkins v. Kempland* (*b*), which will probably be relied on by the other side, is explainable on this principle; for there it appeared that the defendant, the obligor, had executed the annuity bond, not as a surety, but as a principal; so that the nature and amount of the plaintiff's claim against him became definite and calculable immediately upon forfeiture of the bond. *The Skinners' Company v. Jones* (*c*) will also be relied on. But in that case there was no grant of an annuity independent of the condition of the bond; and the payment secured was payment of a sum certain, and not, as in the present case, payment of an amount depending upon the duration of a life.

Queen's Bench.
1852.

AMOTT
v.
HOLDEN.

Next, as to the Statute of Limitations. There was, no doubt, a breach of the condition more than twenty years before the action; but that is not the breach upon which the plaintiff seeks to recover. He might waive the first and other subsequent breaches, and declare for breaches committed within twenty years; *Sanders v. Coward* (*d*): and, having declared generally upon the bond, and having, in his replication to the plea of the Statute of Limitations, suggested breaches committed within twenty years, and having given evidence of those breaches at the trial, he must be considered to have declared upon those breaches; *Tuckey v. Hawkins* (*e*).

(*a*) 8 *Taut.* 315. *Taylor v. Young* (judgment affirmed on Error), 3 *B. & Ald.* 521.

(*b*) 2 *W. Bl.* 1106.

(*c*) 15 *M. & W.* 48. 56.

(*c*) 3 *New Ca.* 481.

(*e*) 4 *Com. B.* 655.

Volume XVIII. [Wightman J. The obligee must be taken to have waived the previous breaches by accepting subsequent payments.] He has chosen not to avail himself of the penalty of the bond in respect of any previous defaults in payment; and therefore the condition of the bond is still in force as regards the non-payments in respect of which he claims; *Blair v. Ormond* (a).

*Annot.
v.
Holden.*

Knowles, J. Henderson and *Milward*, contra. First, the question as to the Statute of Limitations depends, not upon the general law of pleading on this point, but upon the particular form of the record in the present case. In *Sanders v. Coward* (b) and *Blair v. Ormond* (a) the condition of the bond appeared on the pleadings before the plea of the Statute of Limitations was pleaded. In the present case that plea is directed against the obligatory part of the bond only, and is clearly a good plea as to that, the breach having occurred more than twenty years ago. The plea states that the causes of action in the *declaration* mentioned occurred more than twenty years ago; and the replication states that they did not. Upon this issue the defendant is entitled to a verdict. *Tuckey v. Hawkins* (c) is distinguishable. In that case there was only one breach of the condition which the plaintiff could declare upon, and that breach was within twenty years of the action. Here there are several breaches, and a forfeiture, more than twenty years ago, which would satisfy the declaration. The declaration is, therefore, *primâ facie*, upon one of these; and the plaintiff, if he intended to rely on later breaches, ought to have new assigned.

(a) 17 Q. B. 423.

(b) 15 M. & W. 48.

(c) 4 Com. B. 655.

Next, as to the plea of bankruptcy. It is no doubt true that a claim in respect of a debt payable upon

Queen's Bench.
1852.

a contingency cannot always be proved under the commission: but the claim here does admit of proof. A debt is not necessarily incapable of valuation because it arises upon a contingency which has not yet happened.

A MOTT
v.
HOLDEN.

In *The Overseers of St. Martin v. Warren* (a) the claim, as Lord *Ellenborough* observed, was both contingent and, from its nature, incapable of valuation; but he mentions the very case of an annuity as a claim which, although contingent, was recognized by the Courts as admitting of proof. In *Young v. Taylor* (b) the claim was for unliquidated damages, and not for a sum certain. In *In re Willis* (c) it was held that a guarantee for a sum certain, even though the claim did not arise till after the bankruptcy of the guarantizor, was proveable. But in fact the defendant here is as much a principal in the bonds as *Mather*; and the plaintiff might proceed against either without noticing the other. If these had been only covenants, instead of bonds with a condition, the defendant would be equally liable with *Mather* in an action of debt; *Addison v. Gibson* (d), *Caldwell v. Becke* (e). [Lord *Campbell* C. J. The plaintiff might proceed against either the defendant or *Mather* in an action: but it does not follow that he could prove against either under a commission of bankruptcy.] He could prove against either, if both are principals. If *Mather* had become bankrupt, the plaintiff clearly could have proceeded against him under the bond:

(a) 1 R. & Ald. 491.

(b) 8 Taunt. 315. *Taylor v. Young* (judgment affirmed on Error), 3 B. & Ald. 521.

(c) 4 Exch. 530. See *Thompson v. Whatley*, 16 Q. B. 189.

(d) 10 Q. B. 106.

(e) 2 Exch. 318.

Volume XVIII. and the bond puts both *Mather* and the defendant in
1852. the same position. [Lord *Campbell* C. J. In the re-

AMOTT
v.
HOLDEN.

recitals, the defendant appears to be in the position of a surety.] The condition cannot be controlled by the recitals: and in the condition both are made equally liable. But, even assuming the defendant to be a surety only, the plaintiff could have proved against him. It has been argued that, in order to enable the creditor to prove against the surety, it would be necessary to shew that the principal could not pay; and that the Commissioners would not allow a proof dependent upon such shewing, and have no discretion to order inquiry to be made to that effect. But that is not so; where the rights of creditors are in question, the Commissioners would order such inquiries, and allow proof against the surety if it appeared that the principal was not solvent. [Lord *Campbell* C. J. You are arguing against *Thompson v. Thompson* (a). The claim against the surety there was as capable of valuation as the claim against the defendant here; but the Court held that the Commissioner was right in not allowing it to be proved.] The defendant's engagement there was purely collateral, and his liability would not be contemporaneous with that of the principal, as the present defendant's would be with that of *Mather*. In *Thompson v. Thompson* (a), if the surety had paid before the principal had made default, he would have paid what he never owed; that would not be so here. In *Thompson v. Thompson* (a), moreover, the debt accrued after the bankruptcy; in the present case default had been made by *Mather* before the bankruptcy; and a debt accrued upon the default of

either *Mather* or *Holden*, and one which there was no *Queen's Bench*.
difficulty in valuing. 1852.

Further, the penalty of the bond became an absolute debt upon the forfeiture of the bond caused by the first breach, which took place before the bankruptcy. The claim in respect of that penalty was clearly capable of proof: and the annuity itself might, for the purposes of such proof, be valued. *Perkins v. Kempland* (*a*), *The Skinners' Company v. Jones* (*b*) and *Wyllie v. Wilkes* (*c*) are in point. *Ex parte Granger* (*d*) is also in favour of the defendant, as far as it relates to proof under the bond; and the judgments in *Winter v. Mouseley* (*e*) shew that, where a bond is forfeited before the bankruptcy of the obligor, the obligee may prove upon it under a commission.

AMOTT
v.
HOLDEN.

Lord CAMPBELL C. J. With respect to the question upon the Statute of Limitations, after hearing all that could be urged on either side, I entertain no doubt whatever. It is admitted that, since *Sanders v. Coward* (*g*) and *Blair v. Ormond* (*h*), where a bond is conditioned for the performance of a series of acts at stated times, though there may have been a forfeiture by reason of the nonperformance of the first act in that series, yet, if default be made in the performance of subsequent acts, a new cause of action arises upon each default, and the statute runs from that. The obligee, therefore, is not prevented by the statute from suing in respect of breaches committed more than twenty years after the

(*a*) 2 *W. Bl.* 1106.

(*b*) 3 *New Ca.* 481.

(*c*) 2 *Dougl.* 512.

(*d*) 10 *Ves.* 349.

(*e*) 2 *B. & Ald.* 802.

(*g*) 15 *M. & W.* 48.

(*h*) 17 *Q. B.* 423.

Volume XVIII. first breach, if he has chosen to waive the previous
1852. breaches. If the statute could have that effect, the

AMOTT

v.

HOLDEN.

obligor of an annuity bond would be discharged after he had paid the annuity for twenty years, if he had paid it a day too late on each occasion. Reliance is placed on the form of the record: and it is contended that, as it is here drawn up, the plaintiff cannot avail himself of breaches committed more than twenty years after the first breach. I do not, however, think that the record, as it stands, is any bar to such a course. The declaration is upon the bond, simply, and goes for the penalty. The plea states that the causes of action *in the declaration mentioned* did not arise within twenty years before the suit. The replication says that they did. The onus of proof lies upon the plaintiff: and he then brings forward the condition of the bond, as evidence of the nature of the contract, secured by that bond, between the plaintiff and the defendant, and shews breaches of that contract within twenty years. We must therefore consider those breaches to be the causes of action mentioned in the declaration. It was contended, however, that, inasmuch as a previous breach, more than twenty years back, had been proved, that breach must be assumed to be the cause of action declared upon. I think that is not so; and therefore that it was not necessary for the plaintiff to new assign. *Tuchey v. Hawkins* (*a*) is a direct authority upon this point. It was argued that in that case there was only one breach. That fact, however, did not enter into the grounds of the decision. The question raised was, whether the plaintiff, having declared upon the bond alone, could,

upon the Statute of Limitations being pleaded, avail *Queen's Bench.*
himself of the condition to shew breaches within twenty *1852.*
years: and the Court held that he could. I cannot see
any substantial distinction between that part of the case
and the present. The plea of the Statute of Limitations,
therefore, is no bar to the present action. With respect
to the point arising upon the plea of bankruptcy, the
Court will take time to consider its judgment.

AMOTT
v.
HOLDEN.

WIGHTMAN J. The condition of the bond appears on the record; and, for the defendant to succeed upon the plea of the Statute of Limitations, it must have been shewn, according to *Sanders v. Coward (a)*, that *no* breach of that condition took place within twenty years; inasmuch as every breach creates a fresh cause of action. The evidence brought forward at the trial explained what were the causes of action upon which the plaintiff declared, and shewed that they did accrue within twenty years. The defendant, therefore, failed upon this issue.

ERLE J. *Sanders v. Coward (a)* shews that the plaintiff here was at liberty to waive the breaches committed twenty years ago, and rely upon subsequent breaches committed within that period: and I agree with the rest of the Court that the form of the pleadings here does not prevent the plaintiff from taking that course.

Cur. adv. vult.

Their Lordships, in this term, (*June 12th*), not agreeing in opinion, delivered their judgments *seriatim*.

(a) 15 M. & W. 48.

VOL. XVIII. N. S. 2 s

Volume XVIII.
1852.

AMOTT
v.
HOLDEN.

Erle J.

ERLE J. In this case the question is raised, whether the grantee of an annuity secured by the joint and several bond of the grantor and a surety can, under the bankruptcy of the surety, prove for the value of the annuity. In 1828 an annuity of 20*l.*, payable half yearly, was granted by *Mather*. The defendant, *Holden*, joined him in a bond, which, reciting this grant and his consent to be surety, was conditioned to be void if either grantor or surety should pay at the proper days. The annuity was paid by *Mather* half yearly, but never at the proper day; so that the bond had become forfeited before the bankruptcy.

Holden became bankrupt in 1836. It is not stated, nor is it material to enquire, whether there was an arrear at the time of the bankruptcy; because the annuity was afterwards paid from time to time by *Mather* down to 1848. The present action is brought for the arrear left unpaid after that time.

The law is clear, that the liability of the surety for the grantor of an annuity is not a debt payable upon a contingency, proveable under the bankruptcy of the surety by virtue of sect. 164 of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. *Ex parte Thompson* (a) and *Thompson v. Thompson* (b) are express on the point; the impossibility of calculating the solvency of grantors of annuities being there relied upon. I would also refer to the elaborate and able judgments of Messrs. *Merivale*, *Fonblanque* and *Holroyd* upon the question of proving upon an indemnity bond, in *Ex parte Marshall* (c), in support of the same view. It is there shewn that the power of proving for future

(a) 2 *Deacon & Chitty*, 126.

(b) 2 *New Ca.* 168.

(c) 1 *Mont. & Ayr.* 118. See *Ex parte Marshall*, *Mont. & Bligh*, 242.

contingent debts is created by statute, and has been gradually introduced by successive provisions, which are now embodied in sects. 173—177 of The Bankrupt Law Consolidation Act. If the whole of these are taken together, it would appear that certain debts payable upon contingency are specifically provided for in the sections preceding the general enactment in sect. 177; and among those so specifically provided for are annuities, in respect of which, upon the bankruptcy of the grantor, proof must be made in the required form before resort can be had to the surety, whose liability is deferred; and, as no provision is made for proof on the bankruptcy of the surety, the grantor being solvent, it may be presumed, both from the silence of the Legislature and the nature of the liability, that no power for such proof was intended to be given.

Queen's Bench.
1852.

AMOTT
v.
HOLDEN.

Erie J.

But, although this might be true where the surety contracted expressly to pay on default of the grantor, the defendant contended that the form of the present bond created a simultaneous, instead of a successive, liability; and that the grantee might have treated either obligor, at his option, as the grantor, and so might have proved against the defendant, *Holden*, as the grantor of the annuity. I am, however, of opinion that this ground cannot be maintained. The bond shews that the annuity had been already granted, and the relation of grantor and grantee created. The bond is an instrument beyond the grant, with the additional security of the defendant. The two are jointly bound; but the one is described as grantor, the other as surety. Whatever might be the effect of the present form of bond in respect of pleading, in bankruptcy, where the true sub-

Volume XVIII. stance is ascertained without pleading, the present form
1852. creates the same liability as the form in *Thompson v. Thompson* (a).

AMOTT
v.
HOLDEN.

Eyle, J.

If the grantor pays, the surety is free: if he makes default, the surety is liable. It would have been inconvenient to allow the plaintiff to prove against the surety, in 1836, the entire value of an annuity which has been paid by the principal for twelve years after, and may be paid in future by him; and the plaintiff could not have alleged with truth that the defendant had granted an annuity. Where the defendant was surety for the grantor, and had joined the grantor in a warrant of attorney to secure the annuity, on which judgment had been entered up before default, and afterwards the grantor made default, it was held that the grantee could not prove for the annuity under the bankruptcy of the surety, and, though there was a judgment to secure the annuity, the plaintiff was not an annuity creditor of the surety; *Johnson v. Compton* (b). So also, where the grantor and surety covenanted jointly and severally for the payment of the annuity, it was held that the grantee could not prove under the bankruptcy of the surety; the absolute covenant in one part of the deed was controlled by other parts, shewing that the covenantor stood in the relation of surety; *Ex parte Marks* (c).

The defendant further contended that, as the bond had been forfeited by the omission to pay at the day, the penalty had become a legal debt, and so the plaintiff might have proved for the value of the annuity within the amount of the bond, according to *Ex parte Thistle-*

(a) 2 *New Ca* 168.

(b) 4 *Sim.* 37.

(c) 3 *Mont. & Ayrton*, 521.

wood (a), Perkins v. Kempland (b) and other cases cited in Ex parte Marks (c): but, as is there observed by the Chief Judge (d), "These were all cases of bankrupt grantors; and there is no instance that I can find of the grantee having ever been admitted to prove the value of an annuity against the estate of a bankrupt's (e) surety, even upon a bond forfeited."

I would further observe, that it would be contrary to the system of bankruptcy to allow proof for the penalty in all cases of bonds for the performance of promises when there has been a nominal breach but nothing due, and to make the assignees liable indefinitely to a claim for a dividend in case of a future breach. It would have been unjust to the creditors of *Holden*, in 1836, to have retained a dividend for the penalty of the bond, out of which a dividend from time to time might be paid proportionate to an instalment, or part of an instalment, left in arrear by *Mather*; and inconvenient to the assignees to require the accounts to be unsettled during the lives for which the annuity was granted. I am thus of opinion that the plaintiff could not have proved for the penalty of the bond under the bankruptcy of *Holden*, so that the defence under the plea of bankruptcy fails.

WIGHTMAN J. I feel great distrust in the opinion I have formed in this case, in consequence of its differing from those of my Lord Chief Justice and my brother *Erle*; but, such as it is, I have not formed it without deliberate consideration.

This was an action of debt on a joint and several bond

(a) 19 *Ves.* 236.

(b) 2 *W. Black.* 1106.

(c) 3 *Mont. & Ayr.* 521.

(d) P. 532.

(e) Sic. Probably a misprint for "bankrupt."

*Queen's Bench.
1852.*

**AMOTT
v.
HOLDEN.**

Erle J.

Wightman J.

Volume XVIII.
1852. by the defendant and one *Mather* to the plaintiff. The declaration stated the obligatory part of the bond merely, and did not shew the condition. The defendant pleaded a plea of bankruptcy, which was found against him; and the question is, whether, at the time of the bankruptcy, the obligee of the bond could be admitted a creditor, and had a proveable debt under the commission as an annuity creditor, under sect. 54 of stat. 6 G. 4. c. 16., the statute in force at the time of the bankruptcy.

AMOTT
v.
HOLDEN.

Wightman J.

The condition of the bond recited that *Mather* had agreed with the plaintiff for the sale to him of an annuity of 20*l.*, for the joint and several lives of himself and his wife, and the survivor, for the sum of 150*l.*, and that *Mather* had requested the defendant to join in and execute the bond, which he had consented to do, for securing the due and regular payment of the annuity; and that *Amott* had paid the 150*l.* purchase money to *Mather*. It was then conditioned for the bond being void if either *Mather* or the defendant paid the annuity half yearly, at specified days. It does not appear that there was any other grant of, or security for, the annuity than the bond, which appears to have been executed in the year 1828.

The defendant became bankrupt in 1836: and at that time the bond had been forfeited by omission to pay the annuity exactly at the specified days; but there were very trifling, or no, arrears: and it appears that the annuity was paid by *Mather* down to the year 1848: and no attempt was made by the plaintiff to be admitted to prove under the commission against the defendant as an annuity creditor under stat. 6 G. 4. c. 16. s. 54.

It was contended, for the plaintiff, that the defendant's bankruptcy and certificate were no bar to the action, as

he could not have come in as an annuity creditor under the commission, the defendant being a surety merely; and several cases were cited in which it has been decided that the contingent liability of a surety could not be the subject of proof under a commission against him. This was hardly disputed; but it was alleged, on the other side, that the defendant was not a surety, but a principal; that his liability was not collateral, but direct; and that the grantee of the annuity had precisely the same legal rights against him upon the bond as he had against *Mather*. In the cases of *Thompson v. Thompson* (a), *Ex parte Thompson* (b) and *Johnson v. Compton* (c), the bankrupts were all sureties in the strict legal sense, liable only *collaterally*, by the terms of the instruments by which they were bound, and upon default made by their principals, and not until then; and it was said that those cases were, upon that ground, clearly distinguishable from the present. The question then is, whether the defendant is, in contemplation of law, a principal or a surety: if he is a principal, the grantee of the annuity might have come in as an annuity creditor under the commission against *Holden*, as he might if the commission had been against *Mather*, who is admitted to be a principal.

There is no other grant of the annuity, or security for its payment, than the bond itself. The recitals shew that *Mather* had agreed to grant the annuity, and had received the consideration money, and had requested *Holden* to join him in the bond for securing the payment of the annuity, which he accordingly does, in terms which make him as much a principal, and bind him

Queen's Bench.
1852.

AMOTT
v.
HOLDEN.

Wrightman J.

(a) 2 *New Ca.* 168.

(b) 2 *Deacon & Chitty*, 126.

(c) 4 *Simp.* 37.

Volume XVIII. as directly, as they do *Mather*. If the bond is the
 1852. instrument by which the annuity is granted (and there
 AMOTT is no other), *Holden* is as much a grantor as *Mather*,
 v.
 HOLDEN. and as directly liable to pay it, though the original
Wightman J. agreement to grant it was by *Mather* only, and he only
 had the benefit of the consideration. The bond is by
 both *Mather* and *Holden*, conditioned to be void if
 either of them shall pay the annuity at the specified
 times. In *Guy v. Newson* (a) it was held that a co-
 venant by the defendant and two others that they, or
 some or one of them, would pay a sum of money to the
 plaintiff by instalments at future days, was an absolute,
 and not a collateral, covenant by the defendant, though
 it appeared that the defendant had no interest in the
 consideration, and entered into the covenant for the
 benefit of others of the covenantors, and to secure pay-
 ment of money owing from them; and a discharge of
 the defendant under the Insolvent Debtors' Act, 7 G. 4.
 c. 57. s. 46., was a bar to the action; which it would
 not have been, had he been a surety only.

In *Baxter v. Nichols* (b) the bankruptcy and certificate
 of one of several joint covenantors for payment of an
 annuity was held to discharge him, though it appeared
 that he was only a surety; the covenant for payment
 being absolute, and not collateral. The authority of
 this case is recognized by the Courts in the cases of
Browne v. Lee (c) and *Ex parte Marks* (d); but it is
 distinguished from them.

In the present case, the defendant was, in one sense, a
 surety, as he entered into the bond at the request of

(a) 2 Cr. & M. 140. S. C. 4 Tyr. 31.

(b) 4 Taunt. 90.

(c) 6 B & C. 689.

(d) 3 Mont. & Ayr. 521.

Mather, to secure jointly with him the payment of an annuity which *Mather* had agreed to grant, and for which he alone received the purchase money ; but, in law, the defendant bound himself absolutely, and not collaterally ; and he is, as it seems to me, upon the authority of the cases to which I have referred, a principal as between him and the grantee of the annuity.

Queen's Bench.
1852.

AMOTT
v.
HOLDEN.

Wrightman J.

One of the leading cases upon the point, and, in many of its circumstances, nearly resembling the present, is that of *Ex parte Marks* (a). It appeared, in that case, that by an indenture, reciting that one *Coindet* had agreed with one *Galloway* for the sale to him of an annuity of 100*l.*, it was witnessed that, in consideration of 1000*l.* paid to *Coindet*, he (*Coindet*) granted an annuity of 100*l.* a year to *Galloway* ; and *Coindet* and one *Colnaghi* jointly and severally covenanted with *Galloway* that they, or one of them, would pay the annuity at the times specified in the deed. If the deed had stopped there, and there had been no qualification of the covenant, the case, upon the bankruptcy of *Colnaghi*, would exactly have resembled the present ; and it would appear, from the judgment of the Court, that the grantee of the annuity would have been entitled to prove as an annuity creditor, under sect. 54 of stat. 6 G. 4. c. 16., against the estate of *Colnaghi*, though the latter only entered into the covenant to secure the payment, without any benefit to himself. The deed, however, contained a proviso at the end of the covenant that, in case *Coindet* made default in payment of the annuity, *Galloway* would give notice in writing, and demand payment of *Colnaghi*, twenty one days before adopting

(a) 3 Mont. & Ayr. 521.

Volume XVIII. any measure to compel performance of the covenant by
1852. *Culnaghi.* The Court held that this provision controuled

AMOTT

v.
HOLDEN.

Wightman J.

and limited the covenant, and made it conditional and collateral instead of absolute, converting it, in effect, into the covenant of a surety only; and, upon that ground, decided that the grantee of the annuity was not entitled to prove under the commission against *Culnaghi*.

The case *Ex parte Marshall* (a) does not apply to the present, as the bond in that case was not forfeited at the time of the bankruptcy, and therefore could not be proved, being for indemnity merely.

I have been wholly unable to discover any case in which such an obligation as that into which the present defendant entered has been held to be that of a surety. In terms it is that of a principal binding himself to the performance of an act by himself or *Mather*, though originating in a request from *Mather*, and to secure a payment originally contracted for by him. In all the cases cited for the plaintiff the bankrupt was a surety in the legal sense, and collaterally liable only; and those cases, therefore, are clearly distinguishable from this. In point of law, *Holden* was as directly liable as *Mather*: and, if the grantee would be an annuity creditor, by virtue of the bond which had been forfeited, under a commission against *Mather*, I think he would be entitled to come in as an annuity creditor under the commission against *Holden*, and that his certificate is a bar. I may remark that, if *Mather* had become a bankrupt, *Holden* would not have been entitled to the benefit given to sureties for payment of annuities by sect. 55 of the Act, which applies only to persons "who may be collateral

(a) 1 Mont. & Ayr. 118. See *Ex parte Marshall*, Mont. & Bligh, 242.

sureties for the payment of the annuity," which *Holden* Queen's Bench.
1852. is not, as he is not collaterally, but directly, liable. He is, therefore, not a surety within the meaning of the Act.

AMOTT
v.
HOLDEN.

Wightman J.

Other points were taken upon the argument of this case, particularly one upon a plea of the Statute of Limitations: but, as the Court entertained no doubt upon them, and, in effect, decided against the defendant upon those points at the time they were taken, it is unnecessary now to advert to them.

Lord CAMPBELL C. J. In this case I entirely agree with the opinion expressed by my brother *Erle*. Relying upon the reasons and authorities which he has adduced, I have very little to add. The defendant admits that the value of this annuity could not have been proved under his bankruptcy unless by virtue of some special enactment of the Legislature, and that sect. 54 of stat. 6 G. 4. c. 16. is the only one of which he can avail himself. It is further admitted that this does not apply to the case of a surety, and that, if the defendant is to be regarded as a surety for *Mather*, he is still liable.

Lord
Campbell C. J.

With the most sincere deference for the opinion of my brother *Wightman*, I have not been able to bring myself to entertain any doubt that, in this transaction, the defendant is to be regarded as a surety. A surety is a person who makes himself liable for the debt of another; and he is still a surety, although he may be called upon for payment at the same moment with the principal. If he has no interest in the transaction except as surety, and this is fully known to the creditor, who accepts him in the relation of surety, his contract with the creditor must be attended with all the incidents of

Volume XVIII. suretyship. Here it is stated in the condition of the
1852. bond that *Mather* was the sole grantor of the annuity,

AMOTT

v.

HOLDEN.

Lord
Campbell C. J. and that the defendant had been requested to join in the bond, which he had consented to do, for securing

the due and regular payment of the annuity. I confess I cannot see how he was less a surety by the form of the condition, which says that the bond should be void if either *Mather* or the defendant paid the annuity half yearly on the days specified. What would have been the effect if the language had been "if either the *grantor* or his *surety*" paid the annuity? After the recital that *Mather* was the grantor and *Holden* the surety, these two names indicated grantor and surety, and there is nothing to turn the surety into a principal. If, upon the face of a written contract, two appear as joint debtors, and there is nothing to indicate that one of them is only a surety, the rights of the creditor cannot be affected by any part of the transaction between them to which he is a stranger: but the obligee of this bond knew well that the defendant was only a surety, that he had received no part of the consideration for the grant of the annuity, and that, if compelled to pay, although at the very day when the annuity became payable, he would have an action over against *Mather*, as the principal debtor, to recover the amount. If, upon the defendant's bankruptcy, *Mather* being still solvent, the grantee of the annuity had offered to prove it, would not the truth of the transaction have been taken from the recitals in the condition of the bond; and, as against *Holden*'s creditors, had proof been admitted, could it, in justice, have been for more than the contingency of *Mather* becoming insolvent during the lives of the obligee and his

wife? In the course of the argument, the counsel for the defendant were asked, but could not tell, on what principle the proof was to take place, or what was to be done with the amount of the dividend upon the sum at which the contingency of the insolvency of the grantor or the value of the annuity for the joint lives of the grantees was to be estimated; or what remedy the assignees of the surety would have had against *Mather*, the solvent principal.

Queen's Bench.
1852.

AMOTT
v.
HOLDEN.

Lord
Campbell C. J.

It cannot be questioned here, that, as between *Mather* and the defendant, the relation of principal and surety subsisted; and all the reasons seem to me to apply which induced the Courts to hold, in *Thompson v. Thompson* (a) and numerous cases to the same effect, that, however great the hardship may be upon a surety that he should remain liable after he has surrendered all his effects upon a bankruptcy, the Legislature has as yet provided no relief for him, as it has confined the discharge of a bankrupt to debts and liabilities which might be proved, and for which a dividend might be obtained under the bankruptcy, and no machinery is yet provided for proof under the bankruptcy of the surety for a solvent principal.

I regret exceedingly that the question is not upon the record, so that the defendant might have had the opportunity of taking the opinion of a Court of error upon it: but we can only direct that the verdict on the plea of bankruptcy shall stand for the plaintiff.

Rule discharged.

(a) 2 *New Ca.* 168.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

MACGREGOR *against* The Official Manager of
The DOVER and DEAL Railway and CINQUE
PORTS, THANET and COAST Junction Com-
pany.

The South Eastern Railway Company was incorporated for the purpose of making and maintaining that railway, with power to raise moneys for the purposes of the Act. The projectors of an intended Dover & Deal, &c. railway had contemplated bringing a bill before Parliament for the establishment of such railway, but were in doubt as to proceeding.

A SSUMPSIT. The declaration was originally by Lord Albert Conyngham and others, the managing committee of the above named Company; for whom, after issue joined, the Official manager was substituted on suggestion under the Winding up Act, 11 & 12 Vict. c. 45. s. 53. The count recited that, before the making of the promise &c., viz. on 15th October, 1845, "a certain Company was formed and established for the purpose of making a certain railway of the name (to wit) of *The Dover & Deal Railway, Cinque Ports, Thanet & Coast Junction Company*, of which said Company the plaintiffs, before and at the time" of defendant's promise after

Held, by the Court of Exchequer Chamber on Error, that the stipulation by *M.* was a promise that the Company should do an act which was illegal and contravened public policy and a public statute, and that an action did not lie against *M.* upon such promise: and judgment, which had been given for the plaintiff below, was arrested by the Court of Error.

mentioned, "were the managing committee, and then had the management and controul of the affairs of the said Company;" that the Company's objects were such as could not be accomplished without the authority of Parliament, and it was necessary, before proceeding with the works projected, to obtain an Act of Parliament authorizing the same. "And whereas also, before and at the time of the making of the promise of the defendant hereinafter mentioned, doubts were entertained by the managing committee of the said Company as to whether it was expedient and advisable to proceed with the prosecution of the objects of the said Company and to endeavour to obtain an Act of Parliament authorizing the execution of the works projected by the said Company, or whether it would be advisable to abandon the prosecution of the said objects and abstain from applying to Parliament for such an Act as hereinbefore mentioned: And whereas also, before and at the time of making of the promise" &c., "certain negotiations were pending between the managing committee of the said Company and *The South Eastern Railway* Company, of which last mentioned Company the defendant was then the chairman, as to certain propositions before then, viz." on 7th November 1845, "made by the said managing committee of the said first mentioned Company to the said *South Eastern Railway* Company with a view to obtaining the support of the said *South Eastern Railway* Company to the objects of the said first mentioned Company; and thereupon afterwards, and before the commencement of this suit, viz." on 20th January 1846, "in consideration that the managing committee of the said first mentioned Company would not abandon the prosecution of the objects

Queen's Bench.
1852.

MACGREGOR
v.
DOVER AND
DEAL
Railway
Company.

Volume XVIII. of the said first mentioned Company, but would, on the
1852. contrary thereof, proceed therewith, and would, on
behalf of the said first mentioned Company, apply to
Parliament for an Act authorizing the execution of the
works projected by the said first mentioned Company,
and would use due and proper diligence in and about
endeavouring to obtain such Act, and would hand over
the said scheme firstly above mentioned to the said
South Eastern Railway Company in the event of such
Act being obtained, the defendant promised the plain-
tiffs that, in the event of the application to Parliament
for such Act being rejected by Parliament, and of the
said first mentioned Company failing to obtain such Act,
the said *South Eastern Railway Company* would insure
the said Company of which the plaintiffs then were the
managing committee as aforesaid against all loss which
might be caused to the said Company by such rejection
and failure as aforesaid, and would defray and satisfy to
the said last mentioned Company the whole of the
expences of such last mentioned Company which should
be by them incurred in and about the endeavouring to
obtain such Act of Parliament; and that, in the event
of the failure of such last mentioned Company to obtain
such an Act as aforesaid, the managing committee of
the said last mentioned Company should be at liberty
to return to the allottees of shares in such Company
without deduction the whole of the deposits on the
shares of such Company." Averment, that the ma-
naging committee of the last mentioned Company have
always been ready and willing to hand over the said
scheme to the *South Eastern Railway Company* in the
event of such Act being obtained, and, relying on the
said promise, did, to wit on &c., allot divers, viz. 5805

MACREGOR
v.
DOVER and
DEAL
Railway
Company.

shares in the said Company, and receive divers sums, *Queen's Bench.*
to wit &c., as and for deposits on the shares so allotted :
1852.

and that the said committee, relying &c., did not abandon
the prosecution of their objects above mentioned, but
continually proceeded therewith, and, at a reasonable
time in that behalf, viz. 1st *May* 1846, applied on behalf
of the Company to Parliament for an Act authorizing
the execution of their works, and did continually use
proper diligence in endeavouring to obtain such Act ;
of all which &c. ; averment of notice to defendant and
to the *South Eastern Railway* Company: And that
afterwards, and before the commencement of this suit,
viz. 22d *June* 1846, the said application to Parliament
was rejected, and the *Dover* &c. Company wholly failed
to obtain the same : averment of notice to defendant
and the *South Eastern* Company. Further averment,
that the *South Eastern* Company did not insure the
Dover &c. Company against loss by such rejection, nor
defray the whole or part of their expenses in endea-
vouring to obtain such act, although they were, viz. on
&c., requested so to do, and a reasonable time had
elapsed &c. : but, although the expenses incurred by
the *Dover* &c. Company in endeavouring &c. amounted
to a large sum &c. viz. 10,000*L*. (averment of notice),
yet the same is still unpaid: and, although defendant
afterwards, and before action brought, viz. on &c., had
notice of the premises and was requested by plaintiffs
to pay to them or to the *Dover* &c. Company the
amount of the said expenses, and a reasonable time
&c. elapsed before action brought, yet &c. : breach,
non-payment.

Pleas: 1. Non assumpsit. 2. That plaintiffs were

VOL. XVIII. N. S. 2 T

MACGREGOR
v.
DOVER AND
DEAL
RAILWAY
COMPANY.

Volume XVIII. not the managing committee of the first mentioned
1852. Company in manner and form &c. Issues thereon.

MACGREGOR.

v.

DOVER and
DEAL
Railway
Company.

The cause was tried before Lord *Campbell* C. J. at the *London* sittings after *Trinity* term, 1850, when a bill of exceptions was tendered, and a verdict was found for the plaintiff on both issues. Judgment for the plaintiff having been entered up in the Queen's Bench, the defendant brought Error in the Exchequer Chamber, assigning as error that the declaration was not sufficient in law. Errors were also assigned upon the matter shewn by the bill of exceptions; it being objected, in substance, that the contract alleged in the declaration was not proved at the trial: there were also assignments of error as to joinder and non-joinder of parties; but the ground first stated is the only one material to this report.

The writ of error was argued in last *Easter* vacation, May 10th, before *Maule, Cresswell, Williams* and *Tal-fourd* Js., and *Alderson* and *Platt* Bs.

Sir *F. Kelly*, Solicitor General, for the plaintiff in error, defendant below. First, the contract relied upon is illegal, inasmuch as the *South Eastern* Company, or their chairman on their behalf, could not lawfully undertake, out of their funds, to indemnify another Company for the expenses of carrying into effect that Company's undertaking. The *South Eastern Railway* Company is incorporated by stat. 6 & 7 W. 4. c. lxxv., local and personal, public, sect. 1, "for making and maintaining the said railway and other works by this Act authorized, and for other the purposes herein declared;" but it is no part of those purposes that they should speculate in other railways, or contribute to their Parliamentary expenses. Sect. 3

empowers them "to raise amongst themselves any sum of money for making and maintaining the said railway and other works by this Act authorized;" and sect. 4 enacts : "That the money to be raised by the said Company by virtue of this Act shall be laid out and applied, in the first place, in paying and discharging all costs and expenses incurred in applying for, obtaining, and passing this Act, and all other expenses preparatory or relating thereto; and the remainder of such money shall be applied in and towards purchasing lands, and making and maintaining the said railway and other works, and in otherwise carrying this Act into execution." These powers are not varied by any subsequent clause in the same Act (a) or by the later Acts regulating this Company's affairs. [Cresswell J. The clauses cited refer to moneys "to be raised by the said Company :" might the payment in question be made out of profits ?] Nothing in the Act gives such a power. The application contended for is a breach of trust as to the shareholders and as to the public. This is sufficiently clear on principle: but there are several cases in Equity establishing the point, and one at law, *The East Anglian Railways Company v. The Eastern Counties Railway Company* (b), which is decisive. The Act 6 & 7 W. 4.

(a) Sect. 108 authorizes the making of a dividend out of the clear profits of the undertaking: sect. 115 empowers the directors to make calls to carry it on and defray its expenses: by sect. 205 the money produced by the sale of lands not wanted is to be applied to the purposes of the Act: by sect. 208, if the money to be raised under this Act by subscription should not be sufficient for the purposes of the Act, the Company may borrow a further sum (not exceeding &c.) on mortgage: and, by sect. 209, they may, if they think it advisable, instead of so mortgaging, raise money to the said amount by augmentation of their capital stock, such additional sum to be subject to the same provisions &c. (with an exception not material) as if it had been part of the original capital stock.

(b) 11 Com. B. 775.

Queen's Bench.
1852.

MACGREGOR
v.
DOVER AND
DEAL
RAILWAY
COMPANY.

Volume XVIII. c. cvi., local and personal, public, by which the defendants there were governed, was the same in its material clauses, with regard to application of funds, as the *South Eastern Railway Act*.

1852.
MACGREGOR

v.

DOVER and
DEAL
Railway
Company.

Parliament; and one of them had certain bills depending for purposes connected with its railway. The defendants covenanted with the three Companies to take a lease of their railways on certain terms, and to find capital for the works which were the subject of the depending bills, and to pay the costs of preparing and promoting such bills, whether passed or not. The action was brought by the three Companies, then amalgamated, for non-payment of such costs: and the Court of Common Pleas held that they could not recover, the contract by the defendants being beyond the scope of their statutory authority. Both parties were presumed to be aware of the public enactments which made such a contract a breach of trust; and therefore it was held void even as between themselves. It did indeed appear by the record in that case that some shareholders in the *Eastern Counties* railway did not assent. [Alderson B. If all the shareholders had resolved to promote an undertaking not warranted by their Act, would that have made any difference? Maule J. I do not think the want of assent was relied upon in the judgment: the ground was that the Company were only conditionally a corporation.] In the last cited case, reference is made to the words of Lord Langdale in *Colman v. The Eastern Counties Railway Company* (a), which are strong upon the point now before the Court. It may be contended on the other side that, in *The East Anglian Railways Company*

(a) 10 *Beav.* 114.

v. *The Eastern Counties Railway Company* (a), the action was against the Company as the contracting party; here an individual is sued, as having undertaken that something shall be done by the Company. But it is the chairman of the Company, who undertakes that they, the Company, shall do an illegal thing. [*Maule* J. The chairman, legally, is in the same situation as a stranger to the Company. The corporation is *ens rationis*: the chairman or any other individual is a stranger to it. The averment that the defendant was chairman would not have been traversable. It is no more than saying that he was a person having influence; which is not a circumstance of any legal weight.] It is unnecessary, however, to discuss this point: no material distinction arises upon it. In *Beman v. Rufford* (b), another equity decision referred to in the *East Anglian* Company's Case, a railway Company agreed with two others that its line should be worked by the two, who should have perfect controul, and exercise all the rights of the first mentioned Company, for twenty one years. Lord *Cranworth* V. C. expressed a strong opinion that such a contract was illegal, but directed a case to be stated for a Court of law. No case, however, was submitted. The present contract, therefore, cannot be sustained, according to the authorities: it stands upon the footing of an undertaking by *A.* that *B.* shall commit a breach of duty, and do that which is against public policy, and a fraud upon parties who have pecuniary interests involved.

This agreement is also based upon the supposition that the *South Eastern* Company will be bound by a contract for which the only consideration is that the

Queen's Bench
1852.

MACGREGOR
v.
DOVER and
DEAL
Railway
Company.

(a) 11 *Com. B.* 775.

(b) 1 *Sim. N. S.* 550.

Volume XVIII. *Dover &c. Company* will "hand over" to them the
1852. scheme depending before Parliament, if an Act should

MACGREGOR

v.

DOVER and
DEAL.
Railway
Company.

be obtained. But this is no consideration; for such a transfer is illegal and could not be carried into effect. [Alderson B. The meaning must be that the promoters of the scheme will try to get a power to transfer inserted in their Act.] The standing orders forbid such a clause (a). Transfers of the kind are always made by a distinct Act, both parties being before Parliament for the purpose. Apart from the proposed transfer, the mere engagement to go on with the depending bill is no substantial consideration. [Maule J. Might not parties undertake to do their best to obtain a transfer; or to procure an Act authorizing it? And would not such an undertaking be a good legal consideration?] That is not the undertaking shewn by this record. [Maule J. Can you state, as a proposition of law, that there cannot be a legal transfer of any possible railway? And, if there may, must not it be understood that the parties contemplate a transfer by the legal means?] If nothing on the record raises such a presumption, the Court will not make it. Lord Cranworth V. C. was evidently inclined to deny the legality of such a transfer, in *Beman v. Rufford* (b). [Maule J. That is in the case of a given railway: the opinion may not apply to all future ones.]

The Court then said that it would be convenient to hear Channell Serjt. on this part of the case before entering upon the bill of exceptions.

(a) See standing orders of House of Lords as to private bills, 1855: clxxxix. 8. 9. Standing orders of House of Commons, 1855: 140. 141.

(b) 1 Sim. N. S. 550.

Channell Serjt., for the defendant in Error, plaintiff *Queen's Bench.*
below. *The East Anglian Railways Company v. The*

1852.

Eastern Counties Railway Company (a) is, to a certain

extent, an authority against the plaintiff below. But

there the action was by one Company against another:

here an individual undertakes that a Company shall do

certain acts: and, supposing (which perhaps ought not

to be assumed on motion in arrest of judgment) that

the *South Eastern Railway Company* named in the de-

claration is the same with that incorporated and regu-

lated by stat. 6 & 7 W. 4. c. lxxv., it is not to be taken

for granted that the *South Eastern Company* could not

have obtained power, by private Act or otherwise, to

make the required transfer. In the case just referred

to, the question, between two Companies, turned upon

their statutory powers as then existing: the Company

sued had no existence but by a statute; and its powers

could be measured only by that. [*Maule J.* We know,

by a public Act, that there is such a corporation as the

South Eastern Railway Company.] The case is not the

same as if they were sued in that capacity. If the

contract here was illegal, the matter which makes it so

should have been averred in pleading: it does not

appear conclusively on the face of the declaration.

[*Maule J.* I think the Court must intend that the

South Eastern Company is that mentioned in the Act,

and no other (b).] Still the distinction remains, between

the present case and that referred to, that the plaintiff here

is not seeking to make the Company responsible out of

its funds: and there is nothing illegal in a contract with

a distinct party, binding him as a stranger, that, in con-

MACGREGOR

v.

DOVER AND

DEAL

RAILWAY

COMPANY.

(a) 11 Com. B. 775.

(b) See *Church v. The Imperial Gas Light & Coke Company*, 6 A. & E. 856, 7.

Volume XVIII. sideration of a certain course being adopted, he shall
1852. pay a sum as an indemnity if the Company do not.

MACCAGREGOR
v.
DOVER and
DEAL
Railway
Company.
[*Maule* J. You say it ought not to be assumed in such a case that the thing to be done by the Company would be made illegal by a future Act.] That is so. The parties are merely anticipating that an Act will pass containing provisions consistent with their agreement; an event possible, at least. [*Maule* J. Suppose the defendant below had wished to plead performance: must not he have pleaded that the Company had done that which the plaintiffs below expected to be done; that is, had defrayed their expenses?] It would have been enough to say that, in their default, defendant paid. [*Maule* J. He could not plead that except by way of accord and satisfaction. *Cresswell* J. Suppose a man contracted to sell a void living; according to your argument it might be said, in support of such a contract, that an Act might pass to enable him. *Platt* B. The argument might apply even to a contract that some one should commit a felony.] It would not apply if the thing were malum in se. But here the contract is not immoral or, properly speaking, illegal; there is merely an incapacity in the way. In such a case a party may lawfully insure the performance of the act; and that is, in effect, the contract described by the declaration. The defendant below might have supplied his Company with funds to defray the *Dover & Deal* Company's expenses. [*Maule* J. To ascertain the legality of a contract we must see whether or not it would be lawful if fulfilled according to its terms. Here, if that were done, the payment (though under the circumstances supposed) would be a payment by the Company; which, according to the cases cited,

would be a misappropriation of their funds.] Things *Queen's Bench.*
are legal and illegal in different senses. It would not

1852.

be illegal to undertake that something should be done
by a person not *sui juris*, as an infant, who could not
legally contract. [*Maule J.* Suppose the undertaking
were that an infant should marry without proper consent.]

MACGREGOR
v.
DOVER and
DEAL
Railway
Company.

That would be an evasion of the statute law, and against
public policy. Here the undertaking is only that the
Company shall do the thing if there be any legal mode;
if not, that the defendant himself will satisfy the
plaintiffs, or provide the Company with funds to do so.
[*Maule J.* Then the Company would be acquiring
funds by means not authorized, and applying them to
objects not authorized. It might as well be said that
they could discount bills with money supplied to them
for that object. They are not a corporation for such
a purpose.]

Watson (in the absence of Sir *F. Kelly*), in reply, was
stopped by *The Court*, who said that they would con-
sider of this point before they determined upon hearing
further argument.

Cur. adv. vult.

ALDERSON B., on a subsequent day of this Term
(June 1st), delivered the judgment of the Court.

We do not think it necessary to hear the Solicitor
General in reply to the argument of my brother
Channell in this case; nor to consider the questions
involved in the bill of exceptions.

We are of opinion that the declaration does not state
any sufficient cause of action, and that the judgment
ought to be arrested for this defect. This involves the

Volume XVIII. reversal of the present judgment of the Court of Queen's Bench.
1852.

MACGREGOR
v.
DOVER AND
DEAL
Railway
Company.

The declaration states that a certain Company had been formed for the purpose of making a railway from *Dover* to *Deal*, which required an Act of Parliament, and that doubts were entertained by the managing committee whether it was expedient to apply to Parliament, and that certain negotiations were pending between the managing committee and the *South Eastern Railway* Company, of which the defendant was the chairman, as to certain propositions made by the one Company to the other; and then it proceeds, that, in consideration that the managing committee would not abandon their objects, but would proceed therewith, and apply to Parliament for an Act to authorize the making of the *Deal & Dover* Railway, and would hand over the scheme to the *South Eastern* Company in the event of an Act being obtained, the defendant promised the plaintiffs that, in the event of the application to Parliament failing, the *South Eastern* Company would insure the Company of which the plaintiffs were managing committee against all loss which might be caused to the said Company by such rejection and failure, and would defray and pay all expenses which should be incurred by them in endeavouring to obtain the Act of Parliament. The declaration then proceeds to make the necessary averments stating the attempt and failure, and amount of expenses incurred, which the plaintiffs claimed from the defendant, the *South Eastern Railway* Company having failed to make them good.

The Solicitor General argued that this promise of the defendant was in truth a promise that the *South Eastern Railway* Company should do an illegal thing, and that

the promise was therefore void: and we are of that opinion. This is not like the promise of a party that an act impossible to be done shall be done by the defendant or by some third person; but it is a promise that an act shall be done contrary to the public law of the country, of which both parties are bound to take notice. The act is therefore illegal; and the promise that it shall be done is a void promise.

The question is, we think, determined by the decision of the Court of Common Pleas in *East Anglian Railways Company v. Eastern Counties Railway Company* (a). It is there laid down that a railway Company incorporated by Act of Parliament is bound to apply all the funds of the Company for the purposes directed and provided for by the Act, and for no other purpose whatsoever; and then, the defendants having, *inter alia*, covenanted to pay the costs of soliciting bills then pending in Parliament, it was held that the Act incorporating the defendants, being a public Act, must be presumed to be known to the plaintiffs, and that they could not recover, inasmuch as the covenant entered into by the defendants was beyond the scope of their authority as a corporation, and was therefore illegal and void. The Court there say that such a contract is illegal, because it is contrary to the Act of Parliament which was passed to give them certain powers as a corporation for public purposes of advantage to the country at large as well as for the private profit of the individual members of the Corporation; and they add that the actual assent of the whole body of shareholders would make no real difference in the matter.

If this be so, both plaintiffs and defendant here must

Queen's Bench.
1852.

MACGREGOR
v.
DOVER AND
DEAL
RAILWAY
COMPANY.

(a) 11 Com. B. 775.

Volume XVIII.
1852.

**MACGREGOR
v.
DOVER and
DEAL
Railway
Company.**

be taken, with full knowledge of the powers conferred on the *South Eastern Railway Company*, to have made a contract by which the defendant is to bind the Company to do an illegal act; not merely an act which they have no power to do, but an act contrary to public policy and the provisions of a public Act of Parliament. This, we think, is a void contract, and one, therefore, which cannot form the proper ground for a suit in a Court of law. The declaration is, therefore, we think, bad: and the judgment ought to have been arrested in the Court below.

We think, therefore, that the judgment of the Queen's Bench must for these reasons be reversed, and that judgment be now arrested.

Judgment below reversed.
Judgment arrested (*a*).

(*a*) See *Mayor of Norwich v. Norfolk Railway Company*, 4 E. & B. 397; *Bostock v. North Staffordshire Railway Company*, 4 E. & B. 798.

*Wednesday,
May 26th (a).*

**LOWE against The LONDON and NORTH WESTERN
Railway Company.**

Where any corporation has actually used and occupied land, for a corporate purpose, by permission of the owner, it is liable in assumpsit for use and occupation, though there be no contract under seal for such occupation.

Where the corporation so occupying is a railway company, within the provision of stat. 8 & 9 Vict. c. 16., Companies Clauses Consolidation Act, 1845, sect. 97, that any con-

A SSUMPSIT for use and occupation. Plea: Non assumpsit. Issue thereon.

On the trial, before *Jervis C. J.*, at the last Spring

(*a*) And *Thursday, May 27th*. Before *Lord Campbell C. J.*, *Coleridge, Erle and Crompton Js.*

Assizes for Derby, it appeared that land of the plaintiff *Queen's Bench.*
 had been occupied as a place of deposit for bricks *1852.*
 and other materials, used in constructing the works
 of the defendants, by a person alleged to be their
 agent. No written contract or authority to occupy the
 lands was proved. *The London and North Western*
Railway Company are a corporation regulated by Acts
 of Parliament which incorporate The Companies Clauses
 Consolidation Act, 1845 (8 & 9 Vict. c. 16.). The
 defence on the merits was, that the occupier of the
 land was a person constructing the works under a con-
 tract, and that the occupation was by him in his own
 right, and not as agent for the Company. It was also
 objected that, in point of law, the defendants, being a
 corporation, could not be made liable in this action
 unless the plaintiff could prove an authority, under the
 seal of the Company or at all events in writing signed
 by the directors, to occupy the lands.

The Lord Chief Justice gave leave to move to enter a
 nonsuit on this ground, and left it to the jury to say
 whether the defendants had in fact occupied by their
 agent. Verdict for plaintiff.

Macaulay, in last Easter Term, obtained a rule nisi to
 enter a nonsuit pursuant to the leave reserved, or for a
 new trial on the ground that the verdict was against
 evidence.

Miller Serjt. and *Hayes* now shewed cause. It is not
 disputed that, in general, a corporation cannot contract
 by parol; but to this rule there are exceptions; *Beverley*
v. Lincoln Gas Light & Coke Company (a), *Church v.*

Lowe
v.
NORTH
WESTERN
Railway
Company.

tract which, if
 made between
 private persons,
 would be valid
 though made
 by parol only,
 may be made
 by parol on
 behalf of the
 company by
 the directors,
 and shall bind
 the company,
 such parol con-
 tract may be
 presumed
 against the
 company in an
 action for use
 and occupation,
 in the absence
 of direct evi-
 dence to the
 contrary,
 upon proof of
 actual occupa-
 tion by the
 corporation or
 its agent.

Volume XVIII. *The Imperial Gas Light & Coke Company (a).* One of
1852.

LOWE
v.
NORTH
WESTERN
Railway
Company.

these exceptions is where the promise is raised by implication of law, as in *Hall v. The Mayor, &c. of Swansea (b)*. So a corporation cannot make an actual surrender of a lease but by deed under their seal; but, if they accept a new lease, this is a surrender in law of their first lease; 2 *Bac. Abr.* 266 (7th ed.) tit. *Corporations* (E) 3. It is obvious, indeed, that a contract or authority implied by law cannot be under seal. Now, a promise to pay a reasonable satisfaction for lands held or occupied by the defendants is implied by law from the occupation, at least since stat. 11 *G. 2. c. 19. s. 14*. The question here, therefore, comes to be, whether the Corporation could, without making a writing under seal, occupy the lands. It has been repeatedly decided that a corporation may recover as plaintiffs in use and occupation; *Dean and Chapter of Rochester v. Pierce (c)*, *The Mayor of Stafford v. Till (d)*, *Southwark Bridge Company v. Sills (e)*. It is difficult to see why the executed authority to occupy should be void if by parol, when the executed authority to permit to occupy is good. In *Finlay v. Bristol & Exeter Railway Company (g)* *Parke B.* says: "The defendants, a corporation aggregate, originally agreed by parol to take the premises in question for a year. Whether or no that agreement was binding, it is not necessary to determine; for, having occupied, they became liable, according to the authorities, to pay rent for the period they occupied; and in respect of that an action for use and occupation would lie." But in the present case all doubt is removed by The Companies Clauses Consoli-

(a) 6 *A. & E.* 846.

(b) 5 *Q. B.* 526.

(c) 1 *Campb.* 466.

(d) 4 *Bing.* 75.

(e) 2 *Car. & P.* 371.

(g) 7 *Exch.* 409, 415.

dation Act, 1845 (8 & 9 Vict. c. 16.), sect. 97, which *Queen's Bench*.
 enacts that, "with respect to any contract which, if _____
 made between private persons, would by law be valid
 although made by parol only, and not reduced into
 writing, such committee or directors may make such
 contract on behalf of the Company by parol only,
 without writing." The contract to pay for use and
 occupation is one which may be made by private per-
 sons without writing; and therefore it may bind this
 corporation if made by the directors without writing.
 Whether it was so made or not was a question for the
 jury.

LOWE
v.
NORTH
WESTERN
Railway
Company.

(The arguments on the other ground of motion are omitted. *The Court* held that the rule, on this point, could not be supported.)

Mellor and *Macaulay*, contra. The only exception, at common law, to the rule that a corporation can contract only by deed under seal is where the case is one of necessity, or at least of convenience amounting almost to necessity; *Church v. The Imperial Gas Light & Coke Company* (a), *Mayor of Ludlow v. Charlton* (b). Here there was no reason why the authority to occupy should not have been under seal. It is true that corporations have been sometimes held entitled to sue in respect of a parol agreement, where the consideration has been enjoyed. But it does not follow, as has been contended on the other side, that corporations can be sued upon a similar agreement. The doctrine of mutuality in contracts does not apply to such cases. And the distinction between actions by, and actions

(a) 6 A. & E. 846. 861.

(b) 6 M. & W. 815. 822.

Volume XVIII. against, a corporation upon a parol contract is noticed in 1852.

LOWE
v.
NORTH
WESTERN
Railway
Company.

the judgment in *Arnold v. The Mayor of Poole* (a). Moreover, in the present case, the consideration in respect of which the Corporation are sued is the enjoyment of land: land cannot be held by a corporation except under a sealed agreement; and therefore, if such agreement be wanting, they cannot be presumed to have held it. As, therefore, the consideration cannot be presumed to have been enjoyed, an action of assumpsit will not lie. [Lord Campbell C. J. The liability here arises, not upon any express contract, but upon the fact of there having been an actual use and occupation, from which the law implies a promise. In *Finlay v. Bristol & Exeter Railway Company* (b) Parke B. was evidently of opinion that, if there had been an actual occupation by the defendants for the period there in question, they would have been liable in assumpsit in respect of that occupation.] Too much stress has been laid by the other side upon an expression of the learned Judge's opinion, which was a mere dictum, and not necessary to the case. [Lord Campbell C. J. It agrees in principle with the decision of this Court in *Hall v. The Mayor, &c. of Swansea* (c). Where an executory contract only is relied upon, such contract may be void as against a corporation, if not under seal; but, where the consideration for it has been executed, an implied promise arises by law, which does not require any agreement.] *Church v. The Imperial Gas Light & Coke Company* (d) decides that it makes no difference whether the contract is executed or executory. And the law will not imply a promise by a party

(a) 4 M. & G. 860. 896.

(b) 7 Exch. 409.

(c) 5 Q. B. 526.

(d) 6 A. & E. 846.

who can contract only under a certain form, where that form has not been followed; *Lamprell v. Billericay Union* (*a*). [Lord Campbell C. J. That case goes rather far; it must be considered as contradicting *Sanders v. St. Neots Union* (*b*). Crompton J. The Corporation here may contract by parol, under stat. 8 & 9 Vict. c. 16. s. 97. Ought we not to infer that everything has been rightly done, and that, if there be a parol contract, it has been made agreeably to the Act?] It was not suggested, at the trial, that the directors had entered into any contract under the statute. And, to sustain an action on such a contract, the authority of the directors to bind the Company must be regularly proved; *Ridley v. Plymouth Grinding & Baking Company* (*c*), *Homershamb v. Wolverhampton Waterworks Company* (*d*).

Queen's Bench.
1852.

LOWE
v.
NORTH
WESTERN
Railway
Company.

Lord CAMPBELL C. J. I am of opinion that this rule must be discharged. The first point, the question of law, is one which the defendants were justified in advancing, but which I think does not afford any defence to the action. It is, that the defendants, being a corporation, are not liable in assumpsit for use and occupation, inasmuch as they cannot be bound by any contract not under seal. We must assume that the defendants have occupied the land with the consent of the plaintiff. Now *Dean & Chapter of Rochester v. Pierce* (*e*) and *The Mayor of Salford v. Till* (*g*) decide that a corporation may sue in assumpsit for use and occupation, where the land has been occupied

(*a*) 3 Exch. 283. (*b*) 8 Q. B. 810. (*c*) 2 Exch. 711.

(*d*) 6 Exch. 137. See *Smith v. The Hull Glass Company*, 11 Com. B. 897.; *Royal British Bank v. Turquand*, 5 E. & B.

(*e*) 1 Campb. 466. (*g*) 4 Bing. 75.

Volume XVIII. with their consent. I think that the right is reciprocal, 1852.

LOWE
v.
NORTH
WESTERN
Railway
Company.

and that the party by whose permission a corporation has occupied lands may sue them in assumpsit for use and occupation. Then, in *Hall v. The Mayor, &c. of Swansea* (*a*) it was held that a corporation was liable to an action for money had and received in respect of sums which the law implied a promise by them to repay. That was not a case where the doctrine of necessity applied; the only necessity was the obligation which lies upon a corporation to pay its debts; and that necessity exists here. We are also bound to pay great respect to what fell from my brother *Purke* in *Finlay v. Bristol & Exeter Railway Company* (*b*), where he intimated that a corporation was liable in assumpsit for use and occupation, after having actually occupied and enjoyed the land with the consent of the owner. But, independently of these authorities, the Corporation here has an express power, under sect. 97 of the Companies Clauses Consolidation Act, 1845, to make a parol contract, through the directors, for an occupation of land which is necessary for carrying out the undertaking; and, if such a contract be made, the Corporation is liable to be sued in assumpsit in respect of such occupation. That being so, we ought not to defeat the justice of the case by assuming that no such parol contract has been made, when its existence would obviate all difficulty. There was no evidence to negative the existence of such a contract; and we may, therefore, fairly presume it to have existed.

COLERIDGE J. I am of the same opinion. As to the first point, we may assume the jury to have found that the

(*a*) 5 Q. B. 526.

(*b*) 7 Exch. 416.

defendants, by their agent, had occupied the plaintiff's land, by his permission, for the purposes of the Corporation. In the case of an ordinary individual, the law would, under these circumstances, raise a promise on his part to pay for that occupation, which would support an action of assumpsit. There are cases to shew that a corporation also is liable upon an implied promise of this kind; and I do not think we ought to limit the authority of those cases. But, moreover, in the present case, the Corporation had clearly a right to make a parol contract, by means of their directors, for the occupation of land for the purposes of their undertaking. There is, then, no legal impediment to their making the same kind of contract as that which a private individual can make: and we must therefore infer that, if they make such a contract, they are subject to the same liabilities as a private individual. Independently, therefore, of the authorities, I think that this action is maintainable.

Queen's Bench.
1852.

LOWE
v.
NORTH
WESTERN
Railway
Company.

ERLE J. I am of the same opinion. I think there was evidence to go to the jury of an occupation of the plaintiff's land by the defendants for a corporate purpose. The decisions upon the question whether, in respect of such an occupation, an action will lie against a corporation without proof of a contract under seal are, no doubt, conflicting. But the Court of Exchequer, which has always been disposed to maintain the exemption of corporations from liability in respect of contracts not under seal, laid down, in *Finlay v. Bristol and Exeter Railway Company* (a), that, where a corporation had actually occupied land, they were liable to an action of assumpsit for use and occupation. Here, too, the

(a) 7 Exch. 409. See p. 416.

Volume XVIII. corporation have a statutory power to enter into parol contracts for corporate purposes: if, therefore, they enter into such a contract (and we have a right, in the absence of evidence to the contrary, to presume that they have done so here), the same liability attaches to them as would attach to an ordinary individual. I think, therefore, the action is maintainable.

LOWE
v.
NORTH
WESTERN
Railway
Company.

CROMPTON J. concurred.

Rule discharged (a).

(a) See *Henderson v. Australian Royal Steam Navigation Company*,
5 E. & B.

Thursday,
May 27th.

CROSTHWAITE, administrator &c. of BARROW,
deceased, against GARDNER.

A. declared as administrator of *B.*, stating that defendant, in *B.*'s lifetime, was indebted to *B.* in money to be paid by defendant to *B.* on request. It was proved that *B.* had contracted with defendant, in writing, to do certain works for him for 400*l.*, to be paid upon completion of the works : *B.*

died before their completion ; and *A.*, before he had taken out letters of administration, agreed with defendant to complete, and did complete, the works.

Held, that these facts did not support the declaration, inasmuch as, the contract being entire, and the works unfinished at *B.*'s death, no debt accrued from defendant to *B.* in *B.*'s lifetime ; although the new agreement with *A.* amounted, as between him and defendant, to a rescinding of the original contract, which would entitle *A.*, as administrator, to sue on a quantum meruit in respect of the work done by *B.*

(a) This count was abandoned at the trial.

Pleas : 1. Ne unques administrator. 2. (to the first *Queen's Bench.*
count) Payment to *Barrow*. 3. Payment to plaintiff
as administrator. 4. That *Barrow* had agreed with
defendant to do certain carpenter's and joiner's work,
and provide materials for the same, for 415*l.*, to be
allowed in account to *Barrow* on the completion of the
works ; that *Barrow* executed and provided the greater
part of the said work and materials, and that after his
death plaintiff, as administrator, executed and provided
certain other work and materials under the same con-
tract ; and that the accounts stated in the second count
were of and concerning the last mentioned work and
materials solely, together with certain other debts due
from defendant to *Barrow* in his lifetime. The plea
then stated a set-off of money due from *Barrow*, in his
lifetime, to defendant. The replication joined issue on
the first three pleas, and, as to the fourth, alleged a
discharge by defendant, in *Barrow*'s lifetime, of the debt
there pleaded by way of set-off. Issue thereon.

On the trial, before *Cresswell J.*, at the *Liverpool*
Spring Assizes, 1852, it appeared that the intestate,
Barrow, in *April*, 1850, agreed to do certain work for
the defendant under a contract in writing to the follow-
ing effect.

I, the undersigned *Robert Barrow*, agree with *George*
Harrison Gardner, Esq., to perform the whole of the
joiner's and carpenter's work of the new residence
intended to be erected by the said *G. H. G.* at &c. ; all
to be performed in the very best workmanlike manner,
in every way according to the full intent and meaning
of the plans, elevations, &c. ; at and for the sum of 415*l.*

Barrow died in 1851, having completed a portion
of the work under this contract. The plaintiff, before

CROSTHWAITE
v.
GARDNER.

1852.

Volume XVIII. he took out letters of administration, had agreed with
1852. the defendant to complete, and did complete, the re-
CROSTHWAITE remaining portion of the work specified in the contract;
v.
GARDNER. in respect of which portion the claim under the second
count was made (*a*). It was objected, for the defendant,
that, as the contract between him and *Barrow* was an
entire contract, no debt could accrue from the defendant
to *Barrow* until the whole of the work had been com-
pleted, and that therefore, as *Barrow* had died before
completing it, his administrator was not entitled, under
this form of action, to sue for a proportionate sum in
respect of what had been done. A verdict was found
for the plaintiff for 92*l*, leave being reserved to move to
enter a nonsuit. *Knowles*, in last *Easter* term, obtained
a rule *Nisi* accordingly.

Atherton and *Cowling* now shewed cause. The plain-
tiff sues in his representative character for money due to
the intestate in his lifetime; and the ordinary *indebitatus*
count is the form in which such a claim ought to be
stated. The only special count of which the plaintiff
could avail himself would be a count for the non-
completion of the contract by the defendant. But the
plaintiff was not bound to bring his action in that form.
The defendant could have compelled the intestate's
representative to complete the contract; and the in-
testate's representative is therefore entitled to sue the
defendant in respect of the work which the intestate
had already performed. It is contended that the
plaintiff cannot sue for a proportionate part of the sum
agreed to be paid by the defendant under the contract,

(*a*) See p. 640. note (*a*).

because the intestate had not fulfilled his part of the *Queen's Bench.*
contract at the time of his death. But the employment _____
of the plaintiff by the defendant, upon the intestate's
death, amounted to a rescinding of the original contract;
and, upon its being rescinded, the defendant became
liable to pay a proportionate part of the whole sum
payable under the contract. The case is analogous to
that of a servant hired for a year, and dying before
the expiration of that time: his representative would
be entitled to recover the proportionate amount of the
yearly wages which was due at the servant's death.
[Lord *Campbell* C. J. I do not see how the averment
that the defendant was indebted to the intestate *in his*
lifetime can be supported.] As soon as the contract
was rescinded, the defendant became, in contemplation
of law, the intestate's debtor in respect of the work
performed by him, and therefore liable to his repre-
sentative. The Statute of Limitations would begin
to run, not from the time of the rescinding of the
contract, but of the performance of the work by the
intestate. That shews that the liability of the defendant
caused by the rescinding of the contract must be con-
sidered, by relation, as commencing in the intestate's
lifetime. [Lord *Campbell* C. J. Could not the count have
stated that the defendant was indebted to the plaintiff,
as administrator, for work and labour done by the
intestate?] That is certainly not the usual form.
[Crompton J. It would be correct. If a purchase
had been made from the intestate, for which payment
was to be made on a day which happened after his
death, his representative might sue for the purchase
money under a similar form. Lord *Campbell* C. J.
The difficulty here is something like that which arose in

CROSTHWAITE
v.
ARDNFER

Volume XVIII. framing an indictment in the *Case of the Regicides* (a),
 1852. where it was a question in whose reign the crime should
CROSTHWAITE
 v.
GARDNER. be stated to have been committed.]

Knowles and *Joseph Addison*, contrà. If the original contract had been rescinded by mutual agreement between the intestate and the defendant, the plaintiff, as administrator, could have recovered, under the present form of action, a proportionate part of the sum originally agreed to be paid. But, as the contract was rescinded after the death of the intestate, the defendant was not indebted to the intestate in his lifetime; and therefore the count is improperly framed. In order to recover under the declaration as laid, it must be shewn that the intestate himself could have recovered in his lifetime: and it is clear that he could not have done so, the contract not having been then rescinded; *Sinclair v. Bowles* (b). As to the argument on the Statute of Limitations: in *Couper v. Godmond* (c), where an action was brought to recover the consideration money of an annuity which had been granted more than six years before and had been avoided, at the instance of the grantor, within six years, it was held that the statute did not begin to run till the annuity had been avoided. *Churchill v. Bertrand* (d) (where an administratrix was sued for purchase money of an annuity granted by the intestate and set aside by her after his death) is to the same effect. The plaintiff should have declared either on a special count, setting out the original contract, the

(a) *Kelng*, 7. 10.

(b) 9 *B. & C.* 92.

(c) 9 *Bing.* 748. See *Huggins v. Coates*, 5 *Q. B.* 432.

(d) 3 *Q. B.* 568.

rescinding of it, and the accruing of the defendant's *Queen's Bench.*
liability to the plaintiff in consequence of such re- 1852.
scinding, or in the form which has been suggested by
the Court, of an indebitatus count stating that the
defendant was indebted to the plaintiff, as adminis-
trator, in respect of work and labour performed by the
intestate.

CROSTHWAITES
v.
GARDNER.

Lord CAMPBELL C. J. I am sorry that this objection should prevail; but I do not see how it is to be got over. The declaration states that the defendant, in *Barrow's* lifetime, was indebted to *Barrow* in money which was to be paid to him on request. Now that allegation is not proved by the agreement which was put in evidence; for by that it appears that *Barrow* was to be paid only upon completion of the works. Evidence, however, was given of a subsequent agreement between the plaintiff and defendant which amounted to a rescinding of the original contract; and it was contended that, upon such rescinding, the plaintiff became entitled to recover for what had been done by *Barrow*. But it is clear that he could not recover it as a debt due from the defendant to *Barrow* in his lifetime; for, during *Barrow's* lifetime, the original contract was in full force. I think that the rescinding of it amounted to an agreement by the defendant to pay for what had been already done, upon a quantum meruit or a quantum valebat; but that agreement took place after *Barrow's* death, and cannot support a claim for a debt due to *Barrow* in his lifetime. It was said that the original contract must be considered as having been put an end to ab initio, and as having never existed. But such a doctrine would lead to various absurdities and contradictions. For instance, if an action had been

Volume XVIII. brought by *Barrow* in his lifetime, while the original
1852. contract was pending, a rescinding of the contract upon

CROSTHWAITE the very day of trial would give the plaintiff a good cause
v. of action, though he had not one when the writ was
GARDNER. issued. As to the argument upon the Statute of Limitations, it is clear that the statute would run from the rescinding of the contract; otherwise it would run from a time at which the action had not accrued. I think, therefore, that the original contract must be considered as in force until the time at which it was rescinded. The first count, therefore, is not proved. I do not see that there was any difficulty in framing a proper count, or in amending at the trial.

COLERIDGE J. I also regret that this rule must be made absolute; but the law is clear. The declaration alleges that the defendant was indebted to *Barrow*, during his lifetime, in money to be paid to him upon request. Now before *Barrow's* death there was no debt at all due. Between that time and the rescinding of the original contract there was an interval during which *Barrow's* representative, if there had been one, might have sued, though not in the present form, for the work already done. Then comes the question, whether the rescinding of the original contract, after the death of *Barrow*, creates, by relation, a debt due to *Barrow* in his lifetime. I see no ground upon which such a view can be justified, which is, in fact, contrary to the very meaning of the word rescinding. I am therefore of opinion that the declaration cannot be supported.

ERLE J. I am of the same opinion. The rules of pleading do not admit of this form of action being

supported by the evidence which was brought forward at the trial. I think the powers of amendment given to the Court at Nisi prius might have been exercised in favour of the plaintiff, if an application to that effect had been made.

Queen's Bench.
1852.

CROSTHWAITE
v.
GARDNER.

CROMPTON J. concurred.

Rule absolute.

Ex parte DEATH.

*Friday,
May 28th.*

WATSON moved for a rule calling on the Vice Chancellor of the University of *Cambridge*, and the several Heads of Colleges there, as also on the Rev. *Michael Angelo Atkinson* M.A., to shew cause why a prohibition should not issue to restrain all proceedings in respect of a certain complaint by the said *M. A. Atkinson* against *John Death* for an alleged violation of a certain decree or edict made by the Vice Chancellor and Heads of Colleges of the said University on 11th February 1847.

The motion was grounded on an affidavit of *John Death*, stating: That *Courtenay John Vernon*, formerly

The governing body of a University may lawfully issue a decree that every tradesman with whom a person in *statu pupillari* within the University contracts a debt exceeding £1. shall make the same known to the tutor of such person's college, on pain of being discommuned if he omits doing so: and, in case of disobedience, they

may enforce such decree by ordering that no person in *statu pupillari* shall deal with the tradesman for a given period.

If the Vice Chancellor, attended, on summons, by the Heads of Colleges, makes an order to discommune, in pursuance of such decree, this is not a judicial proceeding which the Superior Courts can restrain by prohibition.

It makes no difference, as to these points, that the decree contains other distinct regulations which it requires licensed victuallers to comply with on pain of being deprived of their licenses.

The proceeding for the purpose of discommuning does not become judicial by the Vice Chancellor, through his officer, giving notice to the party complained of that the meeting will be held at a given time and place, and summoning him, or giving him liberty to attend, for the purpose of answering the complaint or offering explanation: nor is the party entitled, on that account, to demand admittance for his attorney.

Volume XVIII. student of *Trinity College, Cambridge*, being indebted to deponent in 143*l.* 17*s.*, deponent, in *March* 1852,

*Ex parte
DEATH.*

instructed his attorney to apply by letter for payment ; and deponent's attorney, by his direction, wrote a letter to the Rev. *M. A. Atkinson*, tutor of the said College, stating his intention to sue Mr. *Vernon* for the debt ; and that deponent accordingly commenced an action in the Court of Queen's Bench against Mr. *Vernon*, who soon afterwards paid the debt and costs. That Mr. *Vernon* was not living in or near the University when the letters were written and action brought. And that no tutor of the said College required deponent to send notice to him of the amount of the said debt at the end of every quarter or at any other period. That, on 8th *May*, deponent was served with the following summons under the hand and seal of office of the Vice Chancellor.

“ *Cambridge University*, to wit. To *John Crouch*, Yeoman Bedell. Whereas the Rev. *M. A. Atkinson*, Master of Arts and tutor of *Trinity College* in this University, has made information before me that *John Death*, horse dealer and livery stable keeper, of *Jesus Lane, Cambridge*, has allowed *Courtenay John Vernon*, student of *Trinity College* and a person in *statu pupillari*, to contract with him the said *John Death* a debt exceeding the sum of *5l.* without sending notice of the same at the end of every quarter to the said *M. A. Atkinson*, in violation of a decree of the Vice Chancellor and Heads of Colleges dated *February* 11th 1847 : You are hereby authorized and directed to summon the said *John Death* before me at *King's College Lodge* on *Monday* next the 10th instant, at the hour of 11 o'clock in the forenoon, to answer the said complaint.

“ Given” &c. “ the 8th day of *May* A.D. 1852.

“ *Richd. Okes*, Vice Chancellor of the University.” (L.S.)

The deponent stated that, at the prescribed time, he went to *King's College Lodge* to answer the complaint, with an attorney, Mr. *Cooper*, whom he had retained "for the purpose of advising and assisting him in making his defence to the said complaint;" but, admittance being denied to the attorney, deponent did not enter the Lodge. The attorney, who claimed admission both in that character and as one of the public, made several attempts afterwards to go in, as did other persons; but they were prevented from doing so. On *May 21st* the School-keeper of the University served the deponent with a document in these terms.

Queen's Bench.
1852.
*Ex parte
DEATH.*

"*May 21st 1852.*

"I am desired to inform you that there will be a meeting of the Vice Chancellor and Heads of Colleges on *Monday the 24th inst.*, at *King's College Lodge*, at 11 o'clock in the forenoon, to hear the complaint made by Mr. *Atkinson* of *Trinity College* of your not having complied with the regulation which requires tradesmen and others to give notice to tutors of Colleges of debts incurred by their pupils; and that you are at liberty to attend, if you please, for the purpose of giving any explanation, but that you must come alone. *Thos. Johnson*, for the University Marshal. To Mr. *John Death*, of *Jesus Lane*, horse dealer and livery stable keeper."

The deponent had no other notice or knowledge of the said complaint; nor any other summons to appear and answer. He did not attend the meeting, but was informed and believed that it was attended by the Vice Chancellor, several Heads of Colleges, the Registrar, and the complainant: and, on the said 24th *May*, the said Vice Chancellor and certain Heads of Colleges, for

Volume XVIII. and in respect of the matter of the said complaint of the
1852. said *M. A. Atkinson*, pronounced the deponent to be

Ex parte DEATH. discommuned until the end of next term.

On May 25th, a printed decree in the following terms was posted up in the several Colleges.

“*King's College Lodge, May 24th 1852.*

“Whereas it has been proved that *John Death*, horse dealer, of *Jesus Lane*, has neglected to comply with an edict of the Vice Chancellor and Heads of Colleges, by which all tradesmen and dealers with whom any person in *statu pupillari* shall have contracted a debt exceeding the sum of 5*l.* are required to send notice of the same at the end of every quarter to the College tutor of the person so indebted, and warned that unless they do so they will be discommuned: It is ordered and decreed by the Vice Chancellor and Heads of Colleges whose names are underwritten, that, from the present date until the end of next term, no person in *statu pupillari* shall either directly or indirectly contract, bargain, buy or sell or have any tradings or dealings with the said *John Death*: and that, if any person in *statu pupillari* shall presume to disobey this decree, he shall for his misdemeanour and contumacy be punished by suspension, rustication or expulsion, as the case shall appear to the Vice Chancellor and the Heads of Colleges to require.

“*Rd. Okes*, Vice Chancellor. *Gilb. Ainslie*. *Geo. Archdale*. *R. Tatham*. *W. Whewell*. *H. Philpott*. *J. Cartmell*. *G. E. Corrie*. *J. Pulling*. *T. Worsley*. *T. E. Geldart*.

“N.B. The description of persons ‘in *statu pupillari*’ comprehends all undergraduates and bachelors of arts.”

The deponent further stated information and belief

that the Vice Chancellor and Heads of Colleges intended to enforce the said decree. He added that his principal customers were students of the University: that, as he believed, the enforcement of the decree would cause him a pecuniary loss of 450*l.*: and that he was not, and never had been, a member, or servant to a scholar, of the University, or a common minister thereof.

*Queen's Bench.
1852.*

*Ex parte
DEATH.*

The attorney, Mr. *Cooper*, who was town clerk of the borough of *Cambridge*, made an affidavit, citing the charters of *Edward III.*, *Richard II.* and Queen *Elizabeth*, which give to the Chancellor of the University of *Cambridge* exclusive cognizance of pleas where a master, scholar, scholar's servant, or common minister, of the University is a party; and stat. 13 *Eliz.* c. 29., confirming the said charters. The affidavit went on to state: That the right to make statutes for the government of the said University is vested in the Regent and Non Regent Doctors and Masters of the said University, commonly called the Senate; but that certain statutes for the government of the said University have from time to time been made by the Crown and accepted by the senate of the said University, and that the principal or governing body of statutes was made by Queen *Elizabeth* in the 12th year of her reign: and that, under such statutes, the Chancellor and Heads of Colleges are empowered to explain and determine doubts in the said statutes; and that thereby the Chancellor, with the consent of the Heads of Colleges, is empowered to assign and impose penalties for the violation of such statutes in all cases where no express penalty is by the said statutes imposed. That the Vice Chancellor and Heads of Colleges of the said University have been accustomed from time to time to make decrees which,

Volume XVIII. although not warranted by the limited powers vested in
1852. them by the said statutes, or by the constitution of the

*Ex parte
DEATH.* said University, have for the most part related exclusively to the junior members of the said University, who not being in a situation to contest their validity, such decrees have been submitted to; but that (with few and for the most part recent exceptions) the Vice Chancellor and Heads of Colleges have not attempted to make decrees relating to the inhabitants of the town of *Cambridge*: and that in several of the excepted cases such decrees have been successfully resisted by the inhabitants of the said town. That, on 11th *February* 1847, the Vice Chancellor and Heads of Colleges, without (as deponent verily believes) having any lawful power or authority so to do, made certain decrees, of which a copy hereafter follows, viz.

“ *St. Catharine's Hall Lodge, Feb. 11, 1847.* ”

“ Whereas it is highly injurious to the good order and discipline of the University that facilities should be afforded to persons in *statu pupillari* to contract without the knowledge of their tutors large debts, or debts with a long extension of credit, notice is hereby given that, if any vintner or victualler shall be proved before the Vice Chancellor to have permitted, after the date hereof, any person in *statu pupillari* to contract a debt for wine or spirituous liquors exceeding the sum of 10*l*. without the knowledge and consent of the tutor of such person, he shall be deprived of his licence. Also that every vintner or victualler with whom any person in *statu pupillari* shall hereafter contract any debt for wine or spirituous liquors shall be required to send notice of the amount of the same at the end of each quarter to the College tutor of the person so indebted, on pain of

deprivation of his license if he shall be proved to have neglected to comply with this regulation. Notice is also hereby given that every tradesman or dealer with whom any person in *statu pupillari* shall hereafter contract a debt exceeding the sum of 5*l*. shall be required to send notice of the amount of the same at the end of every quarter to the College tutor of the person so indebted, on pain of being punished by discommuning or otherwise as to the Vice Chancellor and Heads of Colleges shall seem fit. Also that, if any vintner, victualler, tradesman, dealer, or other person, shall take from a person in *statu pupillari* without the knowledge and consent of his College tutor a promissory note, he shall for so doing be punished by deprivation of his license, by discommuning, or otherwise, as to the Vice Chancellor and Heads of Colleges shall seem fit.

Queen's Bench.
1852.

*Ex parte
DEATH.*

"*H. Philpott*, Vice Chancellor. *Herbert Jenner Fust*.
G. Neville Grenville. *G. Thackeray*. *William Webb*.
W. French. *J. Lamb*. *Gilbert Ainslie*. *John Graham*.
Geo. Archdall. *R. Tatham*. *W. Hodgson*. *B. Chapman*.
Rob. Phelps. *W. Whewell*. *T. Worsley*."

The deponent further stated: That the earliest notice which he has met of the said University proceeding to punish any inhabitants of the town of *Cambridge* by prohibiting the scholars of the said University from dealing with them occurs in the reign of *Henry VII.*, in (as this deponent believes) the year 1493; when it appears that that King addressed letters missive to the Vice Chancellor, Commissary, Proctors and Scholars of the said University, requiring them to revoke and pull down certain prohibitions they had set up in divers places within the said University commanding thereby that no man should buy or sell with divers burgesses of the said town.

Volume XVIII.
1852.

*Ex parte
DEATH.*

That, on 3d *November* 1575, the Senate of the said University made a statute or decree that, if any of the townsmen should impugn the liberties, privileges or customs of the said University, or exhibit gross ingratitude against the University, the scholars or their servants, and should be thereof convicted by the judgment of the Vice Chancellor and major part of the Heads of Colleges and other doctors then in the University, no scholar, nor any one living under the privilege of scholars, should contract, buy or sell with such ungrateful person under the penalty of 100 shillings to be paid to the common chest of the said University as often as they should attempt any thing against that decree.

That, on 27th *May* 1587, the Vice Chancellor and the major part of the Heads of Colleges and other doctors then in the said University made a decree prohibiting under the penalty of 100 shillings any scholar or person having scholar's privilege to buy, sell, contract or communicate with *John Edmunds*, then Mayor of the said town of *Cambridge*, on account of his ingratitude to the said University and the scholars thereof and their servants.

That, on 4th *September* 1587, the Senate passed two graces, which were set forth: The first, after a preliminary recital, proceeded: "May it please you" &c. "to have it decreed" &c. that any burgess, suing out writs in the courts at *Westminster*, tending to the hurt and impeachment of the liberties and privileges of the University, shall "be presently accounted and be as a person or persons discommuned from the society and benefit of this University in all respects and to all purposes in such sort as it may appear it hath been in such cases practised and used; and that every person, scholar, scholars, servant or public minister of the University either

wittingly or of wilful negligence contracting or bargaining with the said person or persons or any other by your authority upon other causes lawfully discommuned, and thereof convicted before the Vice Chancellor for the time being and the greater part of the Heads of Colleges and doctors in the University, and by them so adjudged, shall by virtue of this your ordinance and statute therein be utterly made void and uncapable of any degree, office or other benefit or privilege unto the University belonging, besides the mulct already provided, until he be thereunto restored by your common consent in this place therein obtained." The second grace provided for better making known the names of discommuned persons.

*Queen's Bench.
1852.*

*Ex parte
DEATH.*

The affidavit then stated further instances of discommuning, in 1629 and 1705 (for other offences than that of suing out process at *Westminster* against members of the University); and it concluded as follows. "That within the last twenty six years various persons have been discommuned by the Vice Chancellor and Heads of Colleges for various alleged offences said to have been committed by such persons, and whereof they have been convicted by the Vice Chancellor and Heads of Colleges. That in the Court of the Vice Chancellor of the said University (which under the said letters patent of Queen *Elizabeth* is a Court of record) the Heads of Colleges usually act as assessors or assistants to the said Vice Chancellor: yet, although it has been decided by this Honourable Court that there is no such Court in the said University as the Court of the Vice Chancellor and Heads of Colleges (notwithstanding that in certain cases the statutes of the University require the assent

Volume XVIII. of the major part of the Heads of Colleges to the punishment to be inflicted by the said Court), deponent is informed and verily believes that the Vice Chancellor and Heads of Colleges now claim to have the power to inflict punishments for the violation of the decrees made by them, and allege that in such cases they can proceed without summoning the party accused or giving him due notice of the charge against him; that such party, if he attends, can only do so by grace and favour and not as of right; that he is not entitled to any legal assistance in making his defence to the charge; that the public have no right whatever to be present at any of the proceedings in relation to such charge or the investigation thereof; and that such proceedings are not to be considered as taking place in a Court, although, as this deponent is informed and verily believes, the Registray of the University (who is the proper officer of the Vice Chancellor's Court) attends on all occasions when the Vice Chancellor and Heads of Colleges meet to consider such cases, and records the proceedings of the said Vice Chancellor and Heads of Colleges upon and concerning such cases."

Watson now contended that the decree of 1847, the supposed authority for the proceedings complained of, was one which the Vice Chancellor and Heads of Colleges had no power to make; and he referred to the statutes of the University, and constitution of the Vice Chancellor's Court, as shewn in *Rex v. The Chancellor &c. of the University of Cambridge* (a). [Lord *Campbell* C. J. If the decree of 1847 is a nullity, does the case

admit of a prohibition?] There is a summons to appear before the Vice Chancellor; the proceeding assumes to be judicial; and the result is a heavy penalty upon the party now moving. [Lord *Campbell* C. J. If the Vice Chancellor chooses to withdraw the license which a person had to receive undergraduates in his house, can that party claim to attend the hearing of the case with attorney and counsel?] This is not a case of license. The tradesman has a right to carry on his business. If the proceeding is said to be one instituted before the Vice Chancellor and Heads of Colleges, the answer is, that there is no such body for this purpose. [Lord *Campbell* C. J. Can this proceeding be the subject of a judicial prohibition? *Coleridge* J. Might not the Vice Chancellor and Heads of Colleges in the exercise of their proper authority forbid any dealing at all with the undergraduates?] The steps are taken here in judicial forms. [Lord *Campbell* C. J. You must look to what is actually done. *Coleridge* J. These proceedings relate to persons *in statu pupillari*. Suppose, a boy at *Eton* were forbidden to deal at a particular shop and did so, and the case were such that the Head master ordered every boy to forbear dealing at that shop: could such an order be contested? *Crompton* J. The forms here amount to no more than telling the tradesman what is about to be done, and allowing him to be heard.] In the case *In re The Chancellor &c. of Oxford and Taylor* (*a*), and in *Speakman's Case* (*b*), there cited, discommuning, at *Oxford*, was treated as a proceeding of the University Court. Here, the proceeding is either in the Vice Chancellor's Court or in a Court (of the Vice Chancellor and Heads of Colleges)

Queen's Ben
1852.

Ex parte
DEATH.

Volume XVIII. which does not exist for such a purpose. The letters missive in the cases of discommuning under *Henry VII.*

1852.
*Ex parte
DEATH.*

mentioned in the affidavit of Mr. *Cooper*, were in the nature of a prohibition. The power, therefore, to make the decree of 1847 may be now disputed. [Lord *Campbell* C. J. If the University exceed their jurisdiction over their own pupils, can we question that act in a prohibition?] Virtually, the proceeding is an imposition of penalty upon the tradesman. [Lord *Campbell* C. J. That is not the object: it is, to prevent the pupils from incurring debts which they are not able to pay. *Coleridge* J. Suppose they ordered that no person in *statu pupillari* should have more than three coats, and forbade dealing with any tradesman who would supply more.] They might discommune for the most frivolous reason; as, if a tradesman kept his shop open beyond a certain hour. [Lord *Campbell* C. J. Well: would a prohibition lie? *Coleridge* J. What would apply to the University would apply to schools, great and small.] Masters of schools are not judicial officers. [*Coleridge* J. You assume that the Vice Chancellor and Heads of Colleges acted as judicial officers here.] The decree of 1847 gives powers beyond that of discommuning, and which imply a judicial authority. The subject is an important one, and at any rate fit to be fully discussed.

Lord *CAMPBELL* C. J. To grant this rule would be interfering most improperly with the discipline of the University. I approve highly of the decree of 1847: I think it legal, and should be sorry if there were any obstacle to its being enforced. No ground of objection has been shewn. There is no judicial proceeding: only

a regulation is made, and a very wholesome one for those under the care of the University, that they shall not be permitted to run up debts of a certain amount without notice being given to a tutor. Discommuning is only giving a caution to persons in *statu pupillari* not to deal with certain tradesmen. There is no proceeding in the Court of the Vice Chancellor. We notice that Court, which is a very ancient one: but here no summons to a Court was issued: nothing more was done than to give this horse dealer an opportunity of satisfying the Vice Chancellor and Heads of Colleges that he had not pursued the course of conduct imputed to him. To say that before such a domestic forum a party is entitled to come attended by counsel or attorney is a proposition not tenable. It is true that, in the decree of 1847, other punishments than that of discommuning are mentioned; but in the case before us no attempt has been made to do more than discommune, which was merely directing those in *statu pupillari* not to deal with the particular tradesman.

Queen's Bench
1852.

Ex parte
DEATH.

COLERIDGE J. I see nothing here like an attempt to assume powers which do not exist. Nothing more has been done by the parties against whom this application is made than to enforce upon the young men under their charge a regulation which is quite within the competence of the governing body of a place of education. It is contended that the proceeding was judicial because there was a meeting, a notice to the present applicant, and a complaint depending: and therefore that he had a right to be heard. But we must look to the substance of the proceeding. The Heads of the University took these steps, desiring to enforce a

Volume XVIII. sumptuary regulation, but wishing not to allow this
1852. party to be injured without an opportunity of shewing

*Ex parte
DEATH.*

that he ought not to be affected by it. That does not give him the rights which he now claims. It is said that the case is of importance and ought therefore to be entertained: but in dealing with a great place of education it would be mischievous to encourage a doubt upon a subject of this kind, as to which we see none. If the proceedings in question could be viewed in the light of a judicial enquiry, a pupil might next say that he had a right to be judicially heard before he was forbidden to deal at a particular place.

ERLE J. I am of the same opinion, and think that this was no judicial proceeding.

CROMPTON J. If these proceedings had been as wrong as I think they were right and useful, I should be unwilling to interpose. The steps which were taken are not judicial because a decree and a summons form part of them. The summons amounted to no more than saying, "We wish to hear you before we do that which will be to your prejudice." Such a notice does not turn the proceeding into a judicial one.

Rule refused.

Queen's Bench.
1852.

HANNAH MARTYN, administratrix &c. of RICHARD *Friday,
May 28th.*

LOMAX MARTYN, Clerk, deceased, *against*
CLUE.

COVENANT. The declaration stated that, by in- Declaration in
denture dated 31st December 1836, between covenant, by
lessor against
assignee of
lessee, set forth

a covenant by lessee, for himself, his heirs, executors, administrators and assigns, that he and they would take the premises, from &c., for fourteen years, and would pay the rent; and that lessee, his executors and administrators, would, at his and their own cost, repair and put into tenantable repair the demised premises, he, the lessee, having been already paid by lessor 400*l.*, the valued amount of the then present dilapidations exclusive of rough timber, but not on the stem, which was to be allowed by lessor, his heirs and assigns, on the demised premises: and that, after the premises should have been put into such repair, lessee, his executors, administrators and assigns, would, at his and their proper cost, from time to time repair and keep in tenantable repair the demised premises, being allowed rough timber but not on the stem, upon the demised premises; the timber to be fetched and carried at the expense of lessee, his executors, administrators and assigns: and the said premises so repaired and kept, together with the possession of the said premises, should yield up to lessor at the expiration of the said term: and should not cross crop the land, nor commit any waste &c., but should cultivate the land in a good husbandlike manner and according to the custom of the country. The count then averred entry of the lessee, and assignment by him to defendant, who entered, and was possessed until the expiration of the term.

Breach: That, although lessor, from the time of making the lease till the assignment, was ready and willing at all times to provide for lessee, and, from the assignment till the expiration of the term, was ready and willing to provide for defendant and lessee, on the demised premises, sufficient rough timber, not on the stem, to enable them to repair and put into tenantable repair the said premises, and although lessee did not before the assignment or at any time repair or put into repair the said premises: yet defendant did not after the said assignment repair or put into repair the said premises, nor yield up the same well repaired at the expiration of the term, but suffered them to be ruinous &c. for want of repair, and so left them at the expiration of the term. Also that defendant, after the assignment, cross-cropped the land and did waste, and used and cultivated the land in a bad and unhusbandlike manner, and not according to the custom of the country.

Defendant pleaded, among other pleas, as to suffering the premises to be ruinous and out of repair, and so leaving them: That lessor did not at any time from the assignment till the expiration of the term provide on the premises sufficient rough timber, not on the stem, to enable defendant to repair, nor any rough timber whatever. And he demurred specially to the declaration. Plaintiff demurred to the plea.

Held that the declaration was good: For

1. The covenant to put in repair ran with the land, and bound the assignee, though the lessee, in this part of the deed, covenanted only for himself and his executors and administrators. And that the payment of 400*l.* to the lessee was no ground for construing this covenant as limited to him personally.
2. It was sufficient, on this record, to aver that the lessor was always ready and willing to furnish timber, without stating that he actually did furnish it.
3. A covenant to yield up in repair at the end of a term runs with the land and binds an

Volume XVIII. intestate of the one part and one *William Elliott* of the other part (profert), the intestate, *R. L. Martyn*, demised

1852.

MARTYN
v.
CLUE.

assignee,
though not
named.

4. Breach of
a covenant to
cultivate ac-
cording to the
custom of the
country is suffi-
ciently averred
by stating that
defendant did
not so cultivate,
without speci-
fying instances.

Held also
that the plea
was bad, for
that the con-
dition pre-
cedent to the
defendant's
obligation to
repair was
sufficiently per-
formed if he
was ready and
willing to sup-
ply timber
when required.

to *Elliott* certain messuages, buildings, farms, lands and premises with the appurtenances, situate in *Sussex*, and all tithes of corn &c., together with the game &c., and also all common rights &c. belonging thereto: excepting and reserving to *Martyn*, his heirs and assigns, all timber trees, tillers, saplings and young trees, and the bodies of all pollards, oak, ash, elm, beech, fir and chestnut, and all mines of iron &c. and quarries of stone, then standing, growing, lying or being, or to stand, grow, &c., in, upon or under the demised premises or any part thereof: Habendum to *Elliott*, his executors, administrators and assigns, from 29th *September* 1836 for fourteen years then next &c., yielding and paying therefore the yearly rent of 120*l.* &c.: And that *Elliott*, "for himself, his heirs, executors, administrators and assigns," covenanted to and with *Martyn*, his heirs and assigns, that he, *Elliott*, would pay the said rent &c., and also that he the said *W. Elliott* should and would (a) at his "own sole and proper costs and charges repair and put into good and sufficient tenantable repair all the said messuages, cottages, barns, stables, malthouses, hop-kilns and other agricultural buildings, and the windows, walls, fences, gates," &c., "and other inclosures of all

(a) In the deed, as set out on oyer, the words immediately following the habendum and reservation of rent were: "And the said *William Elliott*, for himself, his heirs, executors, administrators and assigns, doth hereby co-venant, promise and agree with and to the said *Richard Lomer Martyn*, his heirs and assigns, in manner following, that is to say: that he the said *W. Elliott*, his executors, administrators and assigns, will take and hold the said messuages," &c., "and premises hereinbefore demised" &c., "from the 29th day of *September* now last past, for and during" &c. (fourteen years): "And also that he and they shall and will well and truly pay or cause to be paid to the said *R. L. M.*, his heirs and assigns, the said yearly

or any part of the said demised premises; he the said *W. Elliott* having been *then* already paid or allowed by the said *R. L. Martyn* the sum of 400*l.* 17*s.* 8*d.*, being the amount of a valuation of the *then* present irreparations and dilapidations of the said messuages and other buildings, farms, lands and premises, made for the purpose of ascertaining the same by Mr. *Thomas Chrippes*, exclusive of naked rough timber but not on the stem, which *was* to be allowed by the said *R. L. Martyn*, his heirs and assigns, on some part of the said demised premises. And, after the said messuages, cottages and buildings, farms, lands and premises," should "have been put into such good and sufficient tenantable repair to the satisfaction of the said *R. L. Martyn* or his surveyors, then that the said *W. Elliott*, his executors, administrators and assigns," should and would "at his and their like proper costs and charges from time to time and at all times during the remainder of the said term maintain, uphold, fence, repair, and keep in good and sufficient tenantable repair, all the said messuages, cottages, barns, stables, malthouses, hop kilns and other buildings, farms, lands, hereditaments and premises, and every part thereof" thereby demised, in, by and with all proper and necessary reparations and amendments whatsoever; "being allowed naked rough timber (but not on the stem), bricks, tiles and stones on the said demised

rent" &c., "and also shall and will from time to time and at all times during the said term" pay all parochial, parliamentary and other taxes &c. wherewith the premises shall or may be taxed &c., "the land tax and quit rent, if any, excepted: And also that the said *William Elliott*, his executors and administrators, shall and will at his and their own sole and proper costs" &c. ; continuing as in the text.

The words between inverted commas which follow as far as p. 665, post, are the same as those of the deed, except the words in Italicics. "*Then*" was not in the deed; and "*was*" is substituted for "*is*."

Queen's Bench.
1852.

MARTYN
v.
CLUE.

Volume XVIII. premises or within five miles thereof, the stones to be
1852. dug, and, with the timber, bricks, tiles and all other

MARTYN
v.
CLUE.

materials, to be fetched and carried, by and at the
 expence of the said *W. Elliott*, his executors, administrators and assigns: And the said "demised "messuages, cottages, buildings, farms, lands, hereditaments and premises," "so well and sufficiently repaired, amended, fenced and kept, together with the possession of all the said demised premises," should and would "peaceably and quietly leave, surrender and yield up unto the said *R. L. Martyn*, his heirs and assigns, at the expiration or sooner determination of the said term," accidents by fire &c. only excepted: And also should and would (a) in a proper manner during the said term open-drain the coppices and underwoods of the said demised premises, and keep the same as free from water as possible, and should not nor would "cross crop the said demised premises or any part thereof, nor commit any destruction, waste, damage or spoil thereon, but" should and would, "in every instance not" in the said indenture "before specified, use, cultivate and manage the said farms, lands and premises in good husbandlike manner and according to the custom of the country." And the said *R. L. Martyn*, for himself, his heirs and assigns, did in and by the said indenture covenant &c. with and to the said *W. Elliott*, his executors, administrators and assigns, among other things, that he the said *R. L. Martyn*, his heirs and assigns, should and would "find and provide on the said demised premises sufficient rough timber (not on the stem) to enable the said *W. Elliott*, his executors, administrators and assigns, to

(a) The deed itself introduced here some particular stipulations, not noticed in the declaration, as to the treatment of underwoods, pollards, &c., and the cultivation of the land in some other respects. See p. 682, post.

repair and put into repair the said messuages, buildings and premises;" and "that, after the said messuages, buildings, farms, lands, hereditaments and premises" had (a) "been put into good and sufficient tenantable repair by and at the expense of the said *W. Elliott*, his executors or administrators, as aforesaid, he the said *R. L. Martyn*, his heirs and assigns, during the remainder of the said term of fourteen years," should and would, "from time to time, within one month after request made (such request being at a seasonable time of the year), find and provide sufficient rough timber (but not on the stem), and also bricks, tiles and stones (but no other materials), on the said demised premises or within five miles thereof, for repairing the same, such materials to be fetched and carried by and at the expense of the said *W. Elliott*, his executors, administrators and assigns, and to be used and employed in the repairs of the said premises and not elsewhere or otherwise." Then followed a covenant by *Martyn* that *Elliott*, his executors &c. and assigns, should have the use of a messuage &c., and of the barns &c., there, until the 1st of *May* next after the end of the said term, to house and thresh out their corn, &c., without payment of rent, leaving the said messuage &c., barns &c., in tenantable repair, &c. Other stipulations followed, which need not be stated. As by the said indenture &c. will more fully &c.

Averment that, by virtue of the demise, *Elliott*, viz. on 31st *December* 1836, entered and was possessed: and that, after the making of the indenture and during the term thereby granted, viz. on 20th *October* 1846, all *Elliott's* estate, interest, term, &c. in the premises vested

(a) In the deed, "after the said messuages" &c. "have been put" &c.

Queen's Bench.
1852.

MARTYN
v.
CLUE.

Volume XVIII. in the defendant by assignment; whereupon defendant
1852.

MARTYN
v.
CLUE.

entered and became possessed &c., and so continued until the expiration of the term, which term, and the 1st *May* then next, elapsed before the commencement of this suit and in the lifetime of *Martyn*. Nevertheless plaintiff further saith that, although the said *R. L. Martyn* from the time of the making of the said lease until the said assignment was ready and willing at all times to find and provide for the said *W. Elliott*, and, from the said assignment until the expiration of the said term, was ready and willing at all times to find and provide for defendant and the said *W. Elliott*, on the said demised premises, sufficient naked rough timber, and rough timber not on the stem, to enable *Elliott* and the defendant to repair and put into good and sufficient and tenantable repair all the said demised messuages, buildings and premises, cottages, barns, &c., and other agricultural buildings, and the windows, walls, fences, gates, &c., and other inclosures of all and every part of the said demised premises; of which &c. (notice to *Elliott* and defendant): and although the said *W. Elliott* did not, during the time which elapsed from the making of the said lease until the said assignment, or any part of the said last mentioned time, or at any time, repair or put into good or sufficient tenantable repair the said last mentioned demised premises or any part thereof, and although &c. (general averment of performance by *Martyn* of all things on his part to be performed): Yet &c.: Breach by non-payment of rent, not material here. Further breach: That defendant did not at any time after the said assignment to him repair or put into good or sufficient tenantable repair the said demised messuages &c., or the said windows, walls

&c. of all or any of the demised premises, nor did nor would surrender or yield up to *Martyn* at the expiration of the said term of fourteen years or on 1st *May* &c. the said messuages &c. well and sufficiently repaired; but defendant from the time of the said assignment until the expiration of the said term suffered and permitted the said demised messuages, cottages &c. and premises, and every part thereof, to be, and the same during all the time last aforesaid were, ruinous, prostrate, fallen down and in great decay for want of proper and necessary repairing and putting into good and sufficient tenantable repair, and not by reason of accidents by fire &c.; and defendant, at the expiration of the said term of fourteen years, left all such part of the demised messuages &c. and premises as he had covenanted then to yield up, and at the expiration of 1st *May* then next left all such part &c. as he had covenanted then to yield up, in repair as aforesaid, out of repair for want of being repaired &c. Further breaches, That defendant did not open-drain &c., and that he, after the making of the assignment, viz. on &c. and on other days &c. between that day and the expiration of the term, cross-cropped the demised lands and every part thereof, and also committed destruction, waste, damage and spoil on the said demised premises: And that defendant, from the time of the making of the said assignment and from thence continually until the expiration of the said term of fourteen years, in all instances not in the said indenture particularly specified, used, cultivated and managed the said demised farms, lands and premises in a bad and unhusbandlike manner, and not according to the custom of the country. To the damage of plaintiff, as administratrix, of 1000*l.* &c.

Queen's Bench.
1852.

MARTYN
v.
CLUE.

Volume XVIII. Pleas 1 and 2 (after demand of oyer, which was
1852. given) alleged matters which it is unnecessary to set

MARTYN
v.
CLUE. forth, in answer to the averment of breach by non-
payment of rent, and concluded with verifications; upon
which issues in fact were taken.

Plea 3. As to so much of the second breach of covenant as charges defendant with not repairing the messuages, cottages, &c., or the windows, walls, fences, &c., and with suffering the messuages &c. to be ruinous, &c., and with not leaving the premises, at the expiration of the term and on *May* 1st respectively, in repair according to his covenants: That, although *Martyn* was, after the time of the assignment to defendant, and more than one month before the committing by him of any of the breaches of covenant or causes of action in the introductory part of this plea mentioned, and before the expiration of the said term, viz. on 1st *January* A.D. 1847, being a seasonable time in the year for that purpose, requested by defendant to find and provide for and to allow to defendant sufficient rough timber, and also bricks, tiles and stones on the said demised premises or within five miles thereof for repairing the same, to be used and employed in the repairs of the said premises, and defendant was then and for one month thereafter, and from thence continually until the expiration of the said term, ready to fetch and carry away and dig at his own expense such rough timber, bricks, tiles and stones, whereof *Martyn*, viz. on the day and year last aforesaid and always until the expiration of the said term, had notice; and although after such request by defendant more than one month elapsed before the expiration of the said term

of fourteen years, and *Martyn* could and might and ought to have provided such timber within one month after such request as aforesaid according to his said covenant, yet *Martyn* did not nor would within one month after such request, or at any time during the said term or before the expiration thereof, find or provide for or allow to the defendant such rough timber, bricks, tiles and stones as aforesaid, or any rough timber, bricks, tiles or stones. And defendant says that by reason of the promises he was prevented from performing so much of the said covenant in the said indenture mentioned as is referred to and comprehended in the introductory part of this plea, and necessarily and unavoidably suffered the said demised premises to be out of repair, and left the same out of repair, in manner and form &c. Verification.

4. As to so much of the second breach as charges defendant with suffering and permitting the messuages, cottages, &c. to be ruinous &c. during the time in that breach mentioned &c., and with leaving those premises out of repair after the expiration of the term, and at the expiration of *May* 1st then next, contrary to his covenants, "so far as those causes of action are not covered or comprehended in or by the introductory part of the last preceding plea:" that *Martyn* did not at any time from the time of the said assignment to defendant until the expiration of the said term find or provide on the said demised premises sufficient rough timber not on the stem, such as in the said indenture is mentioned, to enable defendant to put into repair the said demised messuages, buildings and premises or any part thereof, or any rough timber whatever, in manner and form &c. Conclusion to the country.

Queen's Bench.
1852.

MARTYN
v.
CLUE.

Volume XVIII. 5. Demurrer, "as to the residue of the said breach of covenant secondly above assigned, that is to say, as to so much of the causes of action charged against the defendant in and by the said second breach as is not comprehended or covered or pleaded to by the introductory parts of the two several pleas next immediately preceding this plea respectively;" assigning for cause: that it is not sufficiently shewn or particularly averred that naked rough timber not on the stem was provided or allowed by *Martyn* on any part of the demised premises to enable *Elliott* or the defendant to put the same into repair; and for that the covenant to put into repair was personal to *Elliott*, and not binding on defendant: and for that, although the premises are averred not to have been put into repair by *Elliott*, they may, consistently with the declaration, have been put into repair by some one to whom the same came by assignment before the assignment to defendant (a) Joinder.

6 and 7. Pleas which led to issues of fact.

8. Demurrer, as to the breach lastly assigned, on the ground that the custom supposed to have been broken was not pointed out with sufficient certainty; and for other causes. Joinder.

The plaintiff demurred to pleas 3 and 4, stating several grounds. Those finally relied upon will appear sufficiently by the argument. Joinder.

The demurrs were now argued (b). A question arising as to the right to begin, *C. Milward*, for the

(a) This last objection was not insisted upon in the argument.

(b) Before Lord Campbell C. J., *Coleridge*, *Erle* and *Crompton* Js. The argument was begun on May 28th, but not concluded till June 1st, when Lord Campbell C. J., *Coleridge* and *Erle* Js. were present: *Crompon* J. was at *Guildhall*.

defendant, relied upon *Hilton v. Earl Granville* (a). *Queen's Bench.*
Lush, contrà, cited Williams v. Jarman (b). *The Court*

 1852.
 called upon

MARTYN
v.
CLUE.

C. Milward, for the defendant. As to the declaration. First: The defendant is not chargeable with the omission to "put into" repair, alleged as part of the second breach. The covenant to do this is confined to *Elliott* the original lessee, his executors and administrators. In the outset of the covenants his "executors, administrators and assigns" are named; but here the assigns are omitted. It seems to have been intended that the repair should be done within a reasonable time; and the plaintiff does not shew that the assignment took place before that time had elapsed. "If the lessee covenant to build a wall upon the premises, it shall not bind the assignee unless he be expressly named in the covenant, and though he be named, yet if the covenant were broken before the assignment, he shall not be bound;" *Bull. N. P.* 159; citing *Grescot v. Green* (c) and *Churchwardens of St. Saviour's v. Smith* (d). After the premises shall have been put in repair, *Elliott* again covenants for his assigns, as well as executors and administrators, to keep the premises in repair during the term.

Secondly, as to the breach of this last mentioned covenant: it was a condition precedent to the necessity of performance that the plaintiff should have allowed timber and other materials; and the count should have

(a) 5 Q. B. 701. 710.

(b) 13 M. & W. 128. S. C. 2 Dowl. & L. 212.

(c) 1 Salk. 199.

(d) 1 W. Bl. 351. S. C. 3 Burr. 1271.

Volume XVIII. averred that this was done; *Thomas v. Cadwallader* (*a*), 1852.

MARTYN
v.
CLUE.

and other authorities, cited in note (3) to *Peeters v. Opie* (*b*). The materials to be found were the very substance with which the work was to be done. If *Thomas v. Cadwallader* (*a*) differs from the present case, it is only in this, that the landlord here was to do something more than merely "finding allowing and assigning," which were stipulated for in that case.

Thirdly, a breach is assigned by not yielding up the premises in good repair: but a covenant to do this does not bind the assignee. It does not run with the land: it is not a thing to be done upon the land during the term, but is altogether dehors the land. In *Doe dem. Strode v. Seaton* (*c*) *Parke* B. says: "Who could have sued for a breach of this covenant, for not giving up possession at the end of the term? It was not a covenant running with the land, and therefore the heir could not sue": and this dictum is referred to in the third edition of *Smith's Lead. Ca.* vol. 1, p. 29, note on *Spencer's Case* (*d*). The action is founded on privity of contract, not of estate. [Lord *Campbell* C. J. You say that it lies, not against the assignee for yielding up the premises unrepaired, but against the lessee for the assignee having so yielded them.] That is so. [*Crompton* J. The yielding up as required is to be "at" the expiration of the term, not "after."]

Fourthly, the covenant last referred to, and the covenant to keep in repair, are to be performed "after" the premises shall have been put in repair to the plaintiff's satisfaction, according to the preceding stipulation; but

(*a*) *Willis*, 496.

(*b*) 2 *Wms. Saund.* 352, 6th ed.

(*c*) 2 *Cro. M. & R.* 728. 730. *S. C. Tyr. & G.* 19.

(*d*) 5 *Rep.* 16a.

that, as the declaration shews, has never been done. [Lord *Campbell* C. J. According to your view, the assignee is neither bound to put the premises in repair nor to keep them repaired.] That may be so. The lessee, it may be presumed, was to put them into such a state at first that an assignee might easily keep them repaired. *Neale v. Ratcliff* (a) shews how essential this may be. [Lord *Campbell* C. J. There the original repair was to be done by the lessor, and the action was against the lessees. You say that it makes no difference as to the liability of an assignee whether lessor or lessee was to do the first repairs.]

*MARTYN
v.
CLUE.*

Fifthly, the breach alleging that the defendant cultivated and managed the lands "in a bad and unhusband-like manner, and not according to the custom of the country," is too vaguely stated. [Lord *Campbell* C. J. I have drawn many declarations for bad husbandry without stating instances.] In *Chitty Junr.'s Precedents of Pleading*, 154, 2d ed., by *Pearson*, a direction is given for specifying instances. In *Earl of Falmouth v. Thomas* (b), there cited, the Court of Exchequer was inclined to think that a breach in the general form was insufficient. The judgment of the same Court in *Angerstein v. Handson* (c) also sanctions the practice of alleging instances. [Crompton J. In *Earl of Falmouth v. Thomas* (b) the count was on an implied contract.] A breach may be too general though it follow the very words of the covenant; *Warn v. Bickford* (d). Among other cases which shew the proper mode of alleging a breach of promise to cultivate according to

(a) 15 Q. B. 916. (b) 1 Cro. & M. 89. S. C. 3 Tyr. 26.

(c) 1 Cro. M. & R. 789. S. C. 5 Tyr. 383.

(d) 7 Price, 550.

Volume XVIII. the custom are *Legh v. Hewitt* (a), *Hartley v. Burkitt* (b)
1852. and *Hallifax v. Chambers* (c).

MARTYN

v.

CLUE.

Lush, contrà. First: The lessee covenants generally for himself, his heirs &c. and assigns, though, in stating who is to execute the particular covenant to repair, assigns are not named. But in a covenant to repair it is not necessary to mention assigns; they are liable at all events, the covenant to repair running with the land. [Lord *Campbell* C. J. The covenant now in question is to put in repair.] That is immaterial. "Where the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee although he be not bound by express words;" *Spencer's Case* (d). [Coleridge J. It is said here that the contract shews a purposed omission of assigns.] It is not of the essence of the covenant that one or another person is named to perform the covenant: it runs with the land, though the lessor furnishes the means of performing it. The duty is the same. It may have been intended that the person receiving the money should put the premises in repair at once; but that does not change the character of the obligation. Suppose the deed had said nothing of the allowance of 400*l*, but it had been proved on a trial that the lessor had furnished that sum: would that have defeated an action against the assignee for not repairing? [Erle J. To repair is not the same as to put in repair, which may require the building of something new. The ordinary repairing covenant

(a) 4 *East*, 154.

(c) 4 *M. & W.* 662.

(b) 4 *New Ca.* 687.

(d) 5 *Rep.* 16 a.

is merely to maintain things in esse in the state they *Queen's Bench*.
were in when the premises were demised. Lord 1852.

Campbell C. J. You need not here go so far as to say

MARTYN
v.
CLUE.

that repairing and putting into repair are the same

thing. *Crompton J.* It is said in *Spencer's Case (a)*

that, if the lessee covenants to build a new wall upon
the place demised, it shall bind the assignee, being for
his benefit, provided the covenant be express, for the
lessee and his assigns.] It is contended on the other
side that the term is not shewn to have vested in the
assignee before the time for putting in repair had elapsed.

[*Crompton J.* If there was a limited time, you ought
to have shewn that the assignee came in before it
expired.] In proof that might be necessary. But in

Churchwardens of St. Saviour's v. Smith (b), the action
being against an assignee on a covenant to do repairs and
build within seven years, the defendant pleaded that the
estate did not come to him by assignment till after the
seven years. [*Crompton J.* That does not shew that
the plaintiff ought not have averred the contrary.] But

the covenant in the present case is not limited to a time;
and the breach is a continuing one. [*Crompton J.* From

what time would the Statute of Limitations run?] The

covenant is broken from day to day. Putting in repair

and repairing were here practically the same thing; for,

if the assignee found the premises unrepaired when

he came in, he was bound to repair them. In *Neale v.*

Ratcliff (c) the lessees covenanted to repair premises, the

lessor first putting them in repair: that was an express

condition precedent to be fulfilled by the lessor; here

the assignee is sheltering himself under the default of

(a) 5 Rep. 16b. (b) 3 Burr. 1271. S. C. 1 W. Bl. 351.

(c) 15 Q. B. 916.

Volume XVIII. the lessee, his assignor. [Lord *Campbell* C. J. It is to
1852. be supposed that he looked into the lease when he took

MARTYN
v.
CLUE.

the premises.] In *Payne v. Haine* (*a*) it was held that a tenant who engaged to keep premises in good repair was bound to put them into such repair if he found it wanting at the time of his taking possession; for, as *Parke* B. said, "he cannot 'keep' them in good repair without putting them into it." [Lord *Campbell* C. J. That does not quite meet the argument that, in the present case, the premises were to be put into repair under a condition precedent.] By the covenants here the same person was to put and to keep in repair. The duty is one, though the covenants, as shewn on the record, state it in an expanded form.

Secondly. The deed, as set out, did not make it a condition precedent to the repair that the lessor should find timber. The lessee was entitled to "rough timber," "not on the stem": he was not bound to ask for it; and the lessor was not obliged to cut his own timber when it might not be required. The repair and the cutting were to be contemporaneous. It is enough that the plaintiff avers readiness and willingness "at all times" "from the said assignment until the expiration of the said term." *Thomas v. Cadwallader* (*b*) is a direct authority in the plaintiff's favour, the count here containing the averment of readiness which in that case was wanting. Where the contract is, on the one hand to sell and deliver goods at a certain price, and on the other to pay such price, the plaintiff, in an action for not delivering, must aver "that he was ready and willing to pay on delivery": note (3) to *Peeters v. Opie* (*c*): but no more is necessary. *Poole*

(*a*) 16 *M. & W.* 541.

(*b*) *Willes*, 496.

(*c*) 2 *Wms. Saund.* 352 *c.* 6th ed.

v. *Hill* (*a*), there cited in note (*c*), is to a like effect. [Lord *Campbell* C. J. That was a stronger case for the plaintiff than this: there could hardly have been a conveyance till the purchaser had shewn such a conveyance as he wanted.] In 2 *Chitty On Pleading*, 397, 7th ed., there is a precedent of a declaration for not repairing, with an averment that plaintiff allowed and provided timber according to stipulation in a lease that defendant should repair "being allowed timber" &c., "to be provided" by the plaintiff: but it is said in note (*i*), p. 399: "If the plaintiff was merely ready to find timber, let the allegation be accordingly, and aver notice of the plaintiff's readiness."

Queen's Bench.
1852.

MARTYN
v.
CLUE.

Thirdly: The covenant to repair and yield up in repair is an entire covenant; and the breach, as alleged, is one and entire; the breach by not yielding up in repair is not to be separated from the rest. But *Matures v. Westwood* (*b*) expressly shews that a covenant to yield up in repair runs with the land.

The fourth objection is met by the answers which have been given to the first and third.

Fifthly: The breach in respect of husbandry is sufficiently assigned in the words of the covenant. And it is a rule of pleading that, where details would make the record unnecessarily prolix and expensive, the averment may be general; subject, of course, to delivery of a particular if required on summons. The opinion intimated by the Court of Exchequer in *Earl of Falmouth v. Thomas* (*c*) is no authority for a more expanded form: there the plaintiff declared upon an implied assumpsit to cultivate in a husbandlike manner and according to the custom of the country; and the defendant might be

(*a*) 6 *M. & W.* 835.

(*b*) *Cro. Eliz.* 599. 617.

(*c*) 1 *Cro. & M.* 89. *S C. 3 Tyr.* 26.

Volume XVIII. 1852. entitled to know what obligation the plaintiff considered him to incur by such undertaking and custom. *Legh v. Hewitt* (*a*) was not an action upon a covenant; and no question arose there as to the necessity of alleging specific instances. The same remarks apply to *Hartley v. Burkitt* (*b*) and *Hallifax v. Chambers* (*c*).

The 3d plea is bad, because it sets up the omission to find "sufficient rough timber, and also bricks, tiles and stones," on the premises or within five miles, as an answer to the breach of covenant by not repairing the demised messuages, cottages, barns &c., or other agricultural buildings, or the windows, walls, fences, &c. The gist of that complaint is the original neglect to repair; but the condition to find sufficient "rough timber" &c. applies to the subsequent repairing only. [Lord *Campbell* C. J. All that is recited as breach in this plea seems to turn upon the not putting in repair.]

Plea 4, which professes to answer the breach by suffering the buildings to be out of repair, is substantially the same as that which was given up on the part of the defendant in *Thomas v. Cadwallader* (*d*). It is no sufficient answer that the plaintiff did not actually find timber: if he was ready and willing to do so, he might insist upon the repair.

C. Milward, in reply. As to the pleas: The breach answered by plea 3 is the neglect, not only to put in repair, but to keep in repair. [Lord *Campbell* C. J. Would not it have been a good answer to that breach that you had put in complete repair?] That would not have met all the allegations. As to plea 4: the similar

(*a*) 4 *East*, 154.

(*b*) 4 *New Ca.* 687.

(*c*) 4 *M. & W.* 662.

(*d*) *Willes*, 496.

plea in *Thomas v. Cadwallader* (*a*) was not abandoned.
And there are material differences between the records
in that case and in the present.

Queen's Bench.
1852.

MARTYN
v.
CLUE.

With respect to the declaration: *Spencer's Case* (*b*) is in favour of the defendant. The covenant to put in repair was a stipulation for "a thing to be newly made," and does not bind the assignee without express words. [Lord *Campbell* C. J. Was not the performance of this a matter essentially connected with the enjoyment? On the construction of the agreement *Payne v. Haine* (*c*) seems to be an authority against you.] In construing covenants, the interests which parties take under the deed may properly be looked to as explaining the intention and determining the rights and liabilities; *Foley v. Addenbrooke* (*d*); *Keightley v. Watson* (*e*): and here, the original lessee having in his hands so large a sum as 400*l.*, paid him by the landlord, it is reasonable to suppose that he separately, and not his assignee, was expected by the landlord to do the original repairs. [Coleridge J. The landlord would probably intend to have the security of both, when he paid so large a sum. Lord *Campbell* C. J. According to your argument, the lessee might pocket the 400*l.*, not doing the repairs, and assign his interest, and the landlord be without remedy against the assignee.] The declaration shews that the defendant did not enter till ten years after the entry of the original lessee, an interval far more than sufficient, it may be presumed, for putting these premises in repair. The dates are laid under a videlicet; but dates so pleaded are taken to be correct, when they are material; *Whitaker v. Harrold* (*g*), *Ryalls v. The Queen* (*h*), *Ryalls*

(*a*) *Willis*, 496.

(*b*) 5 *Rep.* 16 a.

(*c*) 16 *M. & W.* 541.

(*d*) 4 *Q. B.* 197.

(*e*) 3 *Exch.* 716.

(*g*) 11 *Q. B.* 163. 172.

(*h*) 11 *Q. B.* 795. 798.

Volume XVIII. v. *Bramall* (*a*). The covenant to put in repair was to do
1852. a single act; continuous acts are provided for by the

MARTYN
v.
CLUE. stipulations which follow. The averment of being ready and willing to furnish timber is clearly not sufficient to sustain the first breach, which regards a thing to be done at once. Without any request, the plaintiff must have been aware that he had to furnish timber for putting the premises into repair which was then wanted. This alone is sufficient to distinguish the present case from *Thomas v. Cadwallader* (*b*). As to subsequent repairs, indeed, there was an independent covenant to supply the materials on request for repair of the buildings. In *Poole v. Hill* (*c*) the question was, who had to take the first step: the decision is consistent with the defendant's view, if, as he contends, a condition precedent lay upon the plaintiff. In *Matures v. Westwood* (*d*) the point mentioned on the other side is said by *Croke* to have been decided by three Judges in opposition to *Fenner* J. But this does not appear to have been the principal point debated: the case was more than once before the Court; and, in the report of the same case by *Gouldsbrough* (*e*), only one Judge besides *Fenner* is mentioned as having been present when this question was finally discussed. [Lord *Campbell* C. J. On most of the points I do not feel much difficulty; but we will take time to consider them.]

Cur. adv. vult.

Lord CAMPBELL C. J., in the ensuing vacation (June 18th), delivered the judgment of the Court.

(*a*) 1 *Exch.* 734. 738.

(*b*) *Willes*, 496.

(*c*) 6 *M. & W.* 835.

(*d*) *Cro. Eliz.* 599. 617.

(*e*) *Gouldsb.* 175.

In this case we have considered the points relied on for the defendant, and have come to the conclusion that they are not supported, and that the plaintiff is entitled to our judgment.

Queen's Bench.
1852.

MARTYN
v.
CLUE.

With respect to putting the premises in repair, and to delivering them up in repair, we think that each of these stipulations comes within the class of covenants that run with the land, and that they are continuing covenants to the end of the term. The covenant to put in repair is a matter to be done upon the thing demised as much as the repairing. The covenant to leave in repair at the expiration of the term is broken during the term if, at the instant of leaving, the premises are out of repair. The payment of money by the lessor to the lessee for the purpose of putting in repair affords no ground for inferring that the lessor intended to forego any usual security for the performance of that covenant, and no reason for exempting the assignee of the lessee from the usual liability; but on the contrary was notice to him to require the application of that money unless he intended to be himself responsible to the lessor.

With respect to the averment of readiness and willingness to find rough timber, we think it a sufficient performance of the condition precedent relating thereto. It would be unreasonable to require that the timber should be cut before the lessee or his assignee required it for the purpose of using it in repairs. The declaration therefore is right in this respect; and the plea alleging that timber was not found is bad.

The remaining objection was founded on the generality of the breach of the covenant for the cultivating the land in a good husbandlike manner and according to the custom of the country. No authority was cited

Volume XVIII. to shew that an allegation of the breach, following the words of the covenant, was insufficient ; and we find no principle for so holding.

MARTYN
v.
CLUE.

The defendant must be taken to have understood the application of the covenant he chose to make ; and, if there was real difficulty in defending by reason of the generality, the remedy would be by applying for an order for particulars. The separate covenants for specific acts of cultivation do not appear in any degree to be irreconcileable with the custom of the country.

We also think that the plea alleging that materials were not found by the lessor, as stipulated in respect of the lessee's covenant for keeping in repair after the premises had been put in repair, is bad, because it does not apply to the breach assigned in the declaration to which it is pleaded. This breach is in respect of not putting the premises in repair ; and the condition for providing the materials mentioned in the plea applies only to the future repairs after the premises have been put in repair.

Judgment for the plaintiff.

Saturday,
May 29th.

The QUEEN against STREET and others.

The overseers of a parish, at a vestry meeting held for the purpose, assessed a railway Company

at 2,708*l.* The Company gave notice of appeal. At a subsequent vestry it was decided that the assessment should be reduced to 2000*l.*, and that, if the Company refused that compromise, the overseers should take such proceedings as they might be advised were necessary. The Company appealed : and the then overseers, without calling a vestry meeting, contested the appeal. The Sessions reduced the rate to 300*l.*, subject

of *Southampton*, to shew cause why the disallowance by him of 83*l.* in the account of the overseers of the said parish should not be quashed (a).

*Queen's Bench.
1852.*

The QUEEN
v.
STREET.

It appeared by the affidavits that in *July*, 1847, a vestry meeting was held for the purpose of fixing the amount at which *The London and Dorchester Railway Company* should be assessed to the poor rate of the parish, disputes having arisen between the parish and the Company upon that point; and it was then unanimously agreed that the railway should be assessed at 2,708*l.* In *December*, 1847, application was made to the Poor Law Commissioners, on behalf of the parish, for information as to the proper mode of such assessment; but the Commissioners stated that an appeal at Quarter Sessions was the only method of settling the rate. The Company gave notice of appeal against the assessment; and, at a vestry meeting held on 24th *December*, 1847, it was unanimously agreed that the assessment should be reduced to 2000*l.*, and that, if the Company refused to compromise on those terms, the overseers should take such proceedings as they might be advised were necessary. The Company appealed against the reduced assessment, which was made, in 1848, by the overseers whose account contained the item disallowed by the auditor. The overseers did not summon a vestry meeting to decide whether the appeal should be contested or not, but proceeded to contest it on their own responsibility. The Sessions reduced the assessment to 300*l.*, subject to the opinion of the Court of Queen's

to a case for the Queen's Bench. The case was not sent up, the overseers having arranged with the Company that the rate should be fixed at 450*l.* The Poor Law Auditor disallowed the expenses of contesting the appeal, on two grounds: 1., That the overseers should have called a vestry meeting to determine whether the appeal should be contested; 2., That they should, after the decision at Sessions, have summoned a vestry to determine whether the case for the Queen's Bench should be proceeded on. The expenses in question were, after the audit, sanctioned by the inhabitants at a vestry meeting.

Held, that the overseers were not bound to sum-

(a) See stat. 7 & 8 Vict. c. 101. s. 35.

mon a vestry meeting before contesting the appeal or abandoning the case reserved; and that, as the auditor did not allege that what they had done was inexpedient or that they had acted *mala fide*, the grounds of disallowance were bad.

Volume XVIII. Bench on a case; but the case was not sent up, an arrangement having been made between the parish and the Company that the rate should be fixed at 450*l.*

1852.
The QUEEN
v.
STREET.

At an audit held in *June*, 1849, the sum of 83*l.*, being the expenses incurred by the overseers in contesting the appeal, was disallowed by the auditor upon the two following grounds: first, that the overseers ought, before incurring such expenses, to have summoned a vestry meeting to consider the propriety of their so doing; and, secondly, that, after the decision at Sessions, the overseers ought to have summoned a vestry meeting to consider the propriety of going on with the case reserved, and the amount at which the Company should be assessed for the future. After the audit, a vestry meeting was held, at which the expenses in question were approved of by the rate payers present.

Collier now shewed cause. The auditor was right in disallowing this item. Where the expense of contesting an appeal is so large, a vestry should be summoned to decide upon the propriety of incurring it. If the overseers choose to contest the rate upon their own responsibility, they cannot charge the parish with the expense; *Regina v. Fouch* (*a*), *Regina v. Great Western Railway Company* (*b*). Further, the appeal having been contested, the overseers were bound to take the opinion of the rate payers, whether the case reserved by the Sessions should come before the Court of Queen's Bench: that Court might possibly have reduced the rate below the amount which was arrived at by arrangement. In *Willcock's Poor Law*, p. 281, cited by *Taunton J.* in

(*a*) 2 Q. B. 308.

(*b*) 13 Q. B. 327.

Rex v. Gwyer (a), it is laid down that overseers are entitled to charge in their accounts the costs "of an appeal, though decided against them, unless they have been guilty of gross misconduct, or of neglecting to consult the vestry as to the propriety of proceeding in it when there was convenient opportunity." That exception exists here.

*Queen's Bench.
1852.*

The QUEEN
v.
STREET.

Poulden, contrà, was not called on.

COLERIDGE J. In deciding this case we ought to look only at the grounds upon which the auditor disallowed the item in question. The first is, that, before incurring this litigation, the overseers ought to have taken the opinion of the inhabitants, at a vestry meeting, as to the propriety of incurring it. The auditor does not state, or suggest, that the litigation itself was illegal or inexpedient; and therefore the question is simply whether the overseers are bound to obtain the sanction of a vestry meeting before they proceed to defend a rate; and, if they do not take that step, whether they are to be allowed the costs of the defence, however properly it may have been taken up. I find no case which lays down such a principle; nor is the principle a reasonable one. I do not say that taking the opinion of the inhabitants would not be, in many cases, a very proper step: but it is not always necessary. Here the question had been fully discussed before the application to the Poor Law Commissioners, and again, at another vestry meeting, before sending the case to the proper tribunal, the Quarter Sessions. Under these circumstances, the

(a) 2 A. & E. 216 226.

Volume XVIII. summoning a vestry meeting would have been a mere
 1852.

 The QUEEN
 v.
 STREET. formal proceeding. The second ground is, that the overseers ought to have let the case reserved be decided by the Court of Queen's Bench, or have summoned a vestry meeting to determine whether or not the litigation should be abandoned. I see nothing to warrant this objection. The Sessions find against the parish, subject to the opinion of this Court. The overseers prefer, before taking that opinion, to try what can be done by negotiation; and the rate is ultimately fixed at a larger amount than that given by the Sessions. That is no abandonment of the rate; nor is it suggested that there was mala fides on the part of the parish officers: and the mere fact of their not having taken the opinion of the inhabitants before making the arrangement with the Company is no valid ground of objection. The cases which have been cited are not in point. In *Rex v. Gwyer* (*a*), the decision was upon a different point altogether; and in *Regina v. Great Western Railway Company* (*b*) the proceedings by the parish officers were originally illegal.

CROMPTON J. concurred (*c*).

Rule absolute.

(*a*) 2 A. & E. 216.

(*b*) 13 Q. B. 327.

(*c*) Lord Campbell C. J. and Erle J. were at the Criminal Court of appeal.

*Queen's Bench.
1852.*

The QUEEN *against* The Overseers of the
Township of SALFORD.

*Saturday,
May 29th.*

PASHLEY, in last *Easter* Term, obtained a rule calling on the collector and supervisor of Excise for the district of *Manchester*, in the county of *Lancaster*, to shew cause why a licence, (brought up by certiorari) under their hands and seals, authorizing *Thomas Hague* to sell beer &c. by retail as specified therein, should not be quashed.

From the affidavits it appeared that *Hague*, on 3d *July* 1851, became the resident holder and occupier of a house in the township of *Salford*, which is within the excise district of *Manchester*. The house was at that time assessed to the poor rate at 12*l.* 10*s.* *Hague*, being desirous to obtain a licence to sell beer by retail, applied to the overseers of *Salford* in order that the house might be reassessed; and it was accordingly assessed at 16*l.* 5*s.* The township of *Salford* contains more than 10,000 inhabitants (*a*). In *November* 1851, *Hague* paid half a year's poor rate, and afterwards applied to the overseers for a certificate of his being the resident holder and occupier, and of the annual rent at which the house was assessed (*b*);

(*a*) See stat. 3 & 4 Vict. c. 61. s. 1.

(*b*) See stat. 3 & 4 Vict. c. 61. s. 2.

on inquiry, that he was the resident owner and occupier, directed their officers to grant a licence.

Held, on motion to quash the licence, which had been brought up by certiorari, that the granting of the licence was not a judicial act capable of revision by the Court on certiorari. *Scimus* that the proper mode of trying its validity was to treat it as void.

The resident holder and occupier of a house annually rated at above 15*l.*, in a town corporate with a population of more than 5000, called upon the overseers for certificates to enable him to apply, under stat. 3 & 4 Vict. c. 61., for a licence to sell beer by retail. The overseers gave him a certificate of the amount at which the house was rated, and attached their certificate, as directed by stat. 4 & 5 W. 4. c. 85., to the certificate of character produced by him; but refused to certify that he was the resident holder and occupier of the house. The Board of Inland Revenue, being satisfied,

Volume XVIII. and produced the requisite certificate of character
1852. signed by six inhabitants of *Salford* (*a*). The assistant
The QUEEN overseer subscribed at the foot of this document his own
v. certificate as to the parties signing, and also signed and
Overseers of gave to *Hague* a certificate that the house in question was
SALFORD. assessed to the poor rate at 16*l.* 5*s.*; but the overseers
refused to certify that *Hague* was the resident holder and
occupier, or to give their reasons for refusing. *Hague*
addressed a memorial to the Board of Inland Revenue;
and the Board, after inquiry, being satisfied that *Hague*
was the resident holder and occupier, directed their
officers to grant him a licence. The licence was in the
form given in the schedule to stat. 4 & 5 *W. 4. c. 85.*,
except that it did not recite that a certificate of character
had been deposited.

Sir *F. Thesiger*, Attorney General (with whom were
Sir *Fitzroy Kelly*, Solicitor General, *Watson* and *Welsby*),
now shewed cause. First, the sufficiency of the licence
cannot be reviewed upon certiorari. The functions
exercised by the Board of Inland Revenue in granting
licences are ministerial, not judicial; and the
character of those functions is not altered, in the
present case, by the Commissioners having previously
done a quasi-judicial act in dispensing with the
certificate of occupancy. A beer licence cannot be
quashed upon certiorari any more than a game certifi-
cate; the proper mode of questioning the sufficiency of
either would be to treat it at once as void. Next, two
objections are taken to the licence here: first, that it
does not follow the form provided by the statute, as it
does not recite that the person to whom it is granted

(*a*) See stat. 4 & 5 *W. 4. c. 85. s. 2.*

has deposited a certificate of character; secondly, that the Board of Inland Revenue has no power to grant a licence, where the overseers refuse to give the party applying for it the certificates required by the statute. As to the first objection, stat. 4 & 5 W. 4. c. 85. s. 21. provides that a certificate of character shall not be required as to any house within any town corporate of which the population exceeds five thousand; and it appears by the affidavits that the population of *Salford* is 10,000. The licence, moreover, is good upon the face of it, and is therefore not open to this objection, unless it shews that the population is below five thousand. As to the second objection, it is clear that the Legislature meant to vest the controuling power with respect to beer licences in the Board of Inland Revenue, not in the overseers. (He was then stopped by the Court.)

Queen's Bench.
1852.

The QUEEN
v.
Overseers of
Salford.

Pashley and *R. Hall*, contrà. The overseers have a discretionary power as to granting the requisite certificates for a licence; *Regina v. Kensington* (a); and the Board of Inland Revenue, by dispensing with the certificate of occupancy, have, in fact, reversed the decision of the overseers, and have committed an excess of judicial authority. The proper mode, therefore, of reviewing their proceedings is to bring them up by certiorari. [Coleridge J. The licence is granted by the collector and supervisor. Their functions can hardly be considered as judicial.] They represent the Board of Inland Revenue; and what is done by them must be considered as the act of the Board. In *Regina v. Aberdare Canal Company* (b) it was held that, where

(a) 12 Q. B. 654.

(b) 14 Q. B. 854.

Volume XVIII.
1852.

The QUEEN
v.
Overseers of
Salford.

Commissioners, appointed by statute, had a discretionary power to give their consent to the erection of bridges over a canal at the cost of the landowners, such consent was a judicial act which could be reviewed upon bringing up the official entry of it by certiorari. In *Regina v. Arkwright* (a) an order of the Church-building Commissioners for stopping a path through a churchyard was brought up on certiorari, and quashed for informality. And in *Regina v. Coles* (b) an order of Quarter Sessions with respect to the fees of the clerk of the peace was held to be a judicial proceeding, removable by certiorari. The granting of this licence by the Board of Inland Revenue is as much a judicial act as the acts reviewed upon certiorari in these cases, or as the apportionment of a county rate, which is capable of being reviewed in like manner (c).

COLERIDGE J. This rule must be discharged. We are not called upon to determine the nature of the power vested in overseers with respect to granting the certificates requisite for a licence. They may have a judicial authority which is incapable of being controuled or contradicted by the Board of Inland Revenue; and the question whether they have or not may be worthy of investigation. But the question here is, whether the grant of the licence is, in itself, a judicial act over which this Court can exercise a controul. It is argued that the licence really proceeds from the Board of Inland Revenue, and that the functions of the Board are of a judicial character. Now it

(a) 12 Q. B. 960.

(b) 8 Q. B. 75.

(c) The Court having decided on the preliminary question, the points arising as to the certificate itself were not further discussed.

is true that in cases of difficulty the inferior officers would very properly act, as here, upon instructions from the Board; but that does not affect the character of the particular act, the granting of the licence, which is all that we can look at. I do not think that act is a judicial one. The licence itself may be void for not complying with the provisions of the statutes; and the question of its validity may be raised by treating it as void: but to hold that the act of the officer of the Board, in granting the licence, is sufficiently judicial in its character to allow of its being brought here by certiorari would be a very unreasonable doctrine, and would lead to many incongruities and inconveniences. The instances which have been suggested in support of the rule are all instances in which a judicial authority is exercised. Thus, in the apportionment of a county rate, the functionaries by whom the apportionment is made have to determine, not only whether the particular property is liable to be rated, but the proportions in which the rate must be equally distributed through the parish; and, in the case of an order by the Church Building Commissioners to stop up paths through a church yard, the proceeding is based upon a decision, which is clearly judicial in its nature, as to the expediency of such a step. I think that the grant of a licence to sell beer by retail is not judicial; and that therefore it is not an act upon the validity of which this Court can decide upon certiorari.

*Queen's Bench.
1852.*

The QUEEN
v.
Overseers of
Salford.

CROMPTON J. concurred (*a*).

Rule discharged.

(*a*) Lord Campbell C. J. and Erie J. were at the Criminal Court of appeal.

Volume XVIII.
1852.

Mondy,
May 31st.

Ex parte SIR CHARLES JAMES NAPIER.

An officer commanding forces of Her Majesty and of *The East India Company*, in India, has no such legal right, by statute or otherwise, to his pay, as entitles him (in the absence of any specific undertaking or acknowledgment) to a mandamus calling upon the Company to discharge arrears; though he has always received his pay from the Company, and their practice has been to discharge it monthly.

BYLES Serjt. moved (a) for a mandamus calling upon *The East India Company* to pay to Lieutenant General Sir Charles James Napier the sum of 28,198 rupees 14 annas and 8 pice, under the following circumstances, alleged on affidavit.

In 1843, Sir C. J. Napier commanded certain land forces of Her Majesty and of *The East India Company*, then serving in *Scinde* in the *East Indies*. In that year, the said forces captured from the enemy certain booty and prize of war, which, by Royal warrant dated 11th November 1845, was intrusted to *The East India Company* to be distributed as prize-money, in proportions therein pointed out, among the officers and soldiers of the capturing force (b). Under this warrant Sir C. J. Napier received, in 1848 and 1849, and (as he deposed) believed himself entitled to, sums of money amounting to 68,000*l.* sterling.

By commission under Her Majesty's sign manual, dated 13th March, 1849, Sir C. J. Napier was appointed commander in chief of Her Majesty's forces then serving

(a) Before Lord Campbell C. J., Coleridge, Erle and Crompton Js.

(b) The warrant directed: "That, in case any doubt shall arise respecting the claims to share in the distribution aforesaid, or respecting any demand upon the said captured booty or plunder, the same shall be determined by the Directors of *The East India Company* or by such person or persons to whom they shall refer the same: which determination thereupon made shall with all convenient speed be notified in writing to the Commissioners of our Treasury; and the same shall be final and conclusive to all intents and purposes, unless, within three months after the receipt thereof at the office of the Commissioners of our Treasury, we shall be graciously pleased otherwise to order."

in the territorial possessions of *The East India Company*, during Her Majesty's pleasure : and by like Royal commission of the same date he was appointed to the local rank of general in the army in the *East Indies* from 6th *March*, 1849. And by another commission under the common seal of *The East India Company*, dated 19th *March*, 1849, he was appointed commander in chief of all the Company's military forces employed, or which might thereafter be employed, in the *East Indies*, with certain exceptions. He was also appointed by the Company an extraordinary member of the council of *India*. The commissions and appointment remained in force in and after *October* and *November* 1850.

*Queen's Bench.
1852.*

*Ex parte
NAPIER.*

Sir *C. J. Napier* arrived in *India* on *May* 6th 1849, and performed the duties imposed by the said commissions and appointment from thence till *December* 1850, when he resigned the said offices. The pay of the forces serving in *India* has been and is payable and paid by the Company; and, during the period last mentioned, the proper salary of Sir *C. J. Napier* as commander in chief under the said commissions was 14,305 rupees, 7 a. 7 p. (equivalent to 1430*l.* 11*s.* sterling) per calendar month, and was payable monthly, about the third day of each month for the month preceding, according to the usual practice, to Sir *C. J. Napier*. The salary was duly paid down to and including the month of *April* 1850: but in *May* and *June* of that year, respectively, the Company objected to pay the full sum, and claimed to deduct, and did at first deduct, 3,366 rupees, 7 a. 7 p. per month, alleging as a reason that a larger sum had been shared among the capturing army for prize money than ought to have been distributed, and that the Company were entitled to deduct Sir *C. J. Napier's* share of

Volume XVIII. the over payments by monthly instalments out of his pay,
1852.

*Ex parte
NAPIER.*

till the whole alleged excess, amounting to 20,198 rupees, 14 a. 8 p., should have been deducted. Sir *C. J. Napier* protested against this claim; and, in consequence, the deducted sums were paid over to him, and the full monthly salary was received by him down to *September*, inclusive. But, in paying the *October* and *November* salary, the Company again claimed to deduct for the alleged over payments of prize money; and they accordingly stopped and refused to pay the whole of the *October* salary and a portion of that for *November*, the whole deduction amounting to 20,198 rupees, 14 a. 8 p., equivalent to 2019*l.* 17*s.* 6*d.* sterling, which the Company (as Sir *C. J. Napier*'s affidavit stated) were bound to pay him and had no colour of right to withhold.

Payment was demanded of the Company, and refused, on the ground that the sum named had originally been issued to Sir *C. J. Napier* in error on account of his share of the *Scinde* prize money, and had been deducted by the Government of *India* on adjusting the account.

Byles Serjt. contended that, under these circumstances, Sir *C. J. Napier* had a legal right to the sum withheld, but could not recover it by action; and therefore that a mandamus lay, and ought to be granted. The arguments used and authorities cited will appear sufficiently by the judgment of the Court.

Cur. adv. vult.

Lord CAMPBELL C. J., on a subsequent day of the term (*June* 5th), delivered judgment.

This was a motion for a rule to shew cause why a mandamus should not issue directed to *The East India*

Company, commanding them to pay to Lieutenant General Sir *Charles Napier* the sum of 20,198 rupees. *Queen's Bench.*
1852.

He alleges that this is the amount of an improper deduction from the pay due to him as commander of the Queen's forces in *India*, and as commander of the forces of *The East India Company*, in the months of *October* and *November* 1850; but he seeks to recover it as the arrears of such pay.

*Ex parte
NAPIER.*

The first question to be considered is, whether, if his pay had been withheld from him without any reason being assigned, there is any jurisdiction in this Court to order by mandamus the arrears which he claims to be paid to him by *The East India Company*. If there be not, we cannot entertain the question whether *The East India Company* were justified in making the deduction.

The applicant must make out that there is a legal obligation on *The East India Company* to pay him the sum he demands, and that he has no remedy to recover it by action. The latter point becomes material only when the former has been established; for the existence of a legal right or obligation is the foundation of every writ of mandamus. But it seems to us that the attempt to shew that there was any obligation on *The East India Company*, which the law will enforce, to pay any sum of money to Sir *Charles Napier*, either as commander of the Queen's forces or as commander of the native troops, has entirely failed. A legal obligation, which is the proper *substratum* of a mandamus, can only arise from common law, from statute, or from contract. Of course the obligation here contended for cannot arise from the common law, and is not rested on contract. We have therefore to see whether there be any enactment of the Legislature by which it can be supported.

Volume XVIII. It was not contended that an officer in the Queen's
 1852. army at home could apply to us for a mandamus on the
 ground that his pay is improperly withheld from him; and the application is entirely founded on certain statutes respecting *The East India Company* and the government of the dominions belonging to the Crown in *India*. We will examine these statutes in chronological order.

The first relied upon is stat. 33 G. 3. c. 52. "For continuing in *The East India Company*" "the possession of the *British* territories in *India*" and "for establishing further regulations for the government of the said territories." By sect. 128 of that statute it is enacted that all sums issued by the paymaster general of His Majesty's forces for and on account of His Majesty's forces serving in *India* shall be repaid by the said Company, and that the actual expenses which have been or which hereafter shall be incurred for the support or maintenance of the said troops shall be borne and paid by the said Company. But this is an arrangement between *The East India Company* and the *British* Government, and establishes no privity between the Company and any officer whatever.

Then comes stat. 53 G. 3. c. 155., by which in common language the *charter of the East Indian Company was renewed*; and which enacts (sect. 55) that the revenues of the Company shall be applied, "in the first place, in defraying all the charges and expenses of raising and maintaining the forces, as well European as native, military, artillery and marine, on the establishments in the *East Indies*." Still this appropriates no part of these revenues in particular to the commander in chief of the forces.

*Ex parte
NAPIER.*

Next, we have an Indian Mutiny Act, 4 G. 4. c. 81. *Queen's Bench.*
This enumerates a great number of offences for which *1852.*
military men may be tried by Court martial in the *East Indies*; and, by sects. 43 and 44, enacts that no paymaster shall receive fees, or make any deductions, out of the pay or allowance which shall be due to any officer or soldier in the Company's army, other than usual deductions; and that, if any officer or paymaster shall unlawfully detain or withhold for the space of one month the pay and allowances of any officer after such pay and allowances have been received, then, upon proof thereof before a Court martial, every such paymaster or officer so offending shall be discharged from his employment, and shall forfeit 800 sicca rupees: provided that it shall be lawful for the Governor general in council to give orders for withholding the pay of any officer for any period during which such officer shall be absent without leave. But as yet no amount of pay is assigned to the commander in chief or any officer; and no directions are given to the Government to issue the pay or allowances; and no time is mentioned when any pay or allowances shall become due.

We were then referred to stat. 3 & 4 W. 4. c. 85. under which *India* is now governed, and will continue to be governed till the 30th of April 1854. By sect. 79 of this statute it is enacted that the return to Europe of any governor general or commander in chief shall be deemed a resignation of his office, and that the salary and other allowances of any such governor general or other officer shall cease from the day of such his departure or resignation. This certainly supposes that the commander in chief is entitled to some pay and allowances till his departure or resignation, but is entirely

*Ex parte
NAPIER.*

Volume XVIII. silent as to what shall be the amount, or by whom, or when, it is payable.
1852.

*Ex parte
NAPIER.*

Nor is the applicant's case at all advanced by the statute which he next quotes, 7 W. 4 & 1 Vict. c. 47., "To repeal the prohibition of the payment of the salaries and allowances of *The East India Company's* officers during their absence from their respective stations in *India*." This act provides (*a*) that the prohibition of the payment of salaries to officers in the service of *The East India Company* during their absence from *India* shall not extend to cases of sickness, and (*b*) that the Court of Directors shall have power to order the refunding of any part of the salary or allowance received by any officer or servant of the Company, and that the sum so to be refunded shall be a debt due to and recoverable by the Company; without giving any officer any right which he did not before possess.

Chief reliance however was placed on stat. 3 & 4 Vict. c. 37. s. 35., which was asserted to be a statutable recognition of the right of the commander in chief to be paid his salary by the Company, without any deduction. But the statute when examined turns out to be merely a new edition of the India Mutiny Act; and sect. 35 is no more than a repetition and consolidation of sects. 43 and 44 of stat. 4 G. 4. c. 81. It therefore merely renders a paymaster liable to be tried by a Court martial for receiving fees or making improper deductions, or detaining in his hands pay or allowances more than a month after he has received them.

The statutory obligation upon the Company to pay the salaries claimed is in no degree established. Sir *Charles Napier* in his affidavit says that "the pay of the

(*a*) Sect. 1.

(*b*) Sect. 3.

forces serving in *India* has been and is payable and paid by the said Company; and that, during the period of his filling the said offices as aforesaid, the proper pay or salary of him this deponent as commander in chief, under the said commissions from Her Majesty and the Honourable *The East India Company*, was, in Company's rupees, the sum of 14,305 rupees 7 annas and 7 pice per calendar month, which is equivalent to 1430*l.* 11*s.* sterling, and was payable monthly on or about the 3d day of each month for the next preceding month, according to the usual practice, to this deponent by the Honourable *The East India Company*." He thus relies merely on *practice*, which may amount to an honourable but does not to a legal obligation.

We will now examine the authorities quoted by the learned counsel who made the motion. He began with *Gibson v. East India Company* (*a*), in which the Court of Common Pleas held that the retiring pension of a military officer of *The East India Company* does not upon his bankruptcy pass to his assignees. But this was with a view to prove (which it does very conclusively) that no action would lie for the arrears in question at the suit of Sir *Charles Napier* against *The East India Company*; and it has no tendency to shew the legal obligation. *Tindal C. J.* says (*b*): "It is clear that no action could be supported against any one to recover the arrears of half pay granted by the Crown, at least unless the money has been specifically appropriated by the Government, and placed in the hands of the paymaster

Queen's Bench.
1852.

Ex parte
NAPIER.

(*a*) 5 *New Ca.* 262. *Gidley v. Lord Palmerston*, 3 *Brod. & B.* 275, was also cited.

(*b*) 5 *New Ca.* 274, 275.

VOLUME XVII or agent to the account of the particular officer; and there is no ground upon general principle to hold that an action could be maintained against any one, unless under the same circumstances, in the present case."

"Many grounds of inexpediency in allowing a claim of the present description to be recoverable in a Court of law readily suggest themselves. If the retired pension which is given for former services can be recovered by action, why should not the pay and allowances for actual service be equally so during their continuance? And yet how frequently is it not only expedient, but absolutely necessary, that military pay should be suspended and kept in arrear beyond the day when it becomes due, and until the service, in respect of which it is earned, has been entirely completed? Not to mention the expense and inconvenience which must arise if a suit might be instituted by each individual officer, and the prejudice which such litigation would necessarily occasion to the military service." "The grant in question" "appears to us to range itself under that class of obligations which is described by jurists as *imperfect obligations*; obligations which want the 'vinculum juris,' although binding in moral equity and conscience; to be a grant which *The East India Company*, as governors, are bound in *foro conscientiae* to make good, but of which the performance is to be sought for by petition, memorial, or remonstrance, not by action in a Court of law." These observations seem to us to be equally applicable to the full salary of a commander in chief as to the half pay of a lieutenant colonel, and not only to an action, but to a proceeding in a Court of law by mandamus.

We have been also referred to *Rex v. The Directors of The East India Company* (a), where a mandamus was actually granted against them, ordering them to transmit to India a dispatch on the "Political Department," as altered by the Board of Control: but this was under an Act of Parliament, 33 G. 3. c. 52. s. 12., which expressly imposed upon the directors the legal obligation to do so.

*Queen's Bench.
1852.*

*Ex parte
NAPIER.*

Reliance is then placed on the case of *Rex v. Lords of the Treasury* (b), in which this Court granted a mandamus to the Lords of the Treasury to pay to Mr. Carmichael Smyth the arrears of a pension granted by the Crown for services: but (as has been repeatedly explained (c)) this decision went entirely on the ground that the Lords of the Treasury had admitted that they had in their hands the sum of money in question, and that they had appropriated it to his use.

The last case cited was *Regina v. Lords of the Treasury, In re The Queen Dowager's Annuity* (d), in which this Court intimated an opinion that, if the arrears of the annuity claimed had been due, mandamus would have been the proper remedy to recover them. But the ground was, that, if the right existed, it was a legal right, and there was no mode of enforcing it except by this prerogative writ; for the annuity was charged on the consolidated fund; and the statute 4 & 5 W. 4. c. 15. s. 13. enacted that the payment of such an annuity can only be obtained by the warrant of the Lords of the Treasury, and had imposed upon them the duty of

(a) 4 B. & Ad. 530.

(b) 4 A. & E. 286.

(c) See *Regina v. Lords of Treasury, In re Smyth*, 4 A. & E. 976. *Regina v. Same, In re Hand*, 4 A. & E. 984. *Regina v. Commissioners of Woods and Forests*, 15 Q. B. 761. 772.

(d) 16 Q. B. 357.

Volume XVIII granting the warrant when payment of the annuity
1552 becomes due.

*Ex parte
SALTER.*

Thus, upon a full examination of the statutes and decisions relied upon, it is quite manifest that the distinguished officer who now seeks redress by a writ of mandamus has mistaken his course: and therefore the rule to shew cause for which he has applied cannot be granted.

Rule refused.

*Thursday,
June 3d.*

The Trustees of the BIRKENHEAD DOCKS,
Appellants, *against* The Overseers of the
Poor of the Township of BIRKENHEAD.

Reported, 2 E. & B. 148.

Queen's Bench,
1852.

The QUEEN *against* SAVILE.

Thursday,
June 3d.

MONTAGUE SMITH, in last *Easter Term*, obtained a rule calling on the prosecutor to shew cause why he should not pay to the defendant his costs in this prosecution.

A rule for a criminal information against the defendant had been obtained at the instance of the prosecutor, who entered into recognizance in 20*l.* to prosecute. The case was tried before *Erle J.* and a special jury, at the last *Devon Spring Assizes*; and a verdict was found for the defendant. The learned Judge certified that the case was one proper to be tried by a special jury, and refused to certify that there was reasonable cause for exhibiting the information.

Collier now shewed cause. The defendant is entitled only to a sum equal to the amount of the prosecutor's recognizance; *Rex v. Filewood* (*a*). This rule is unnecessary for that purpose. The proper course is to take out a side bar rule to tax: that being done, the defendant may claim such an amount of costs as equals that of the recognizance.

Montague Smith, contra. The costs may be taxed out of Court; but the Court itself must decide whether or not costs are to be allowed at all. [Coleridge J. The

Under stat.
4 & 5 W. & M.
c. 18. s. 2., a
defendant in
a criminal
information
which is not
tried, or in
which a verdict
is given for
the defendant,
is entitled only
to such an
amount
of costs as
equals the
amount of the
prosecutor's
recognizance.
Sensible, That
the proper
mode of ob-
taining such
costs is for the
defendant to
take out a side
bar rule for
taxing the
whole costs;
and, upon that
being done, he
is entitled to
so much of
them as equals
the amount of
the recogni-
zance.

(a) 2 T. R. 145.

Volume XVIII. Court does, in effect, decide that, by granting a side bar rule as has been suggested. In *Rex v. Woodfall* (*a*) it was held that the awarding of costs to the defendant is compulsory upon the Court, where the Judge has refused to certify that there was reasonable cause for exhibiting the information.] The condition of the recognizance, as provided by stat. 4 & 5 W. & M. c. 18. s. 2., is that the prosecutor shall effectually prosecute the information, "and abide by and observe such orders as the said Court shall direct." And the section contains a separate provision that the Court "is hereby authorized to award to the said defendant" his costs. This clearly shews a discretion in the Court in the matter of costs. [Lord *Campbell* C. J. That argument was used in *Rex v. Filewood* (*b*); but it was there held that a defendant is not, under that section, entitled to more costs than the amount of the prosecutor's recognizance. I see no reason for departing from the usual practice.]

Per Curiam (*c*).

Rule discharged on payment of
20*l.* within one month.

(*a*) 2 *Stra.* 1131.

(*b*) 2 *T. R.* 145.

(*c*) Lord *Campbell* C. J., *Coleridge, Wightman and Erie* *Jr.*

Queen's Bench.
1852.

The QUEEN *against* The Company of Proprietors
of the EAST LONDON WATERWORKS.

Saturday,
June 5th.

NOTICE of appeal was given by the *East London Waterworks Company* against a rate made upon them, on 27th December 1850, by the Paving Commissioners under stats. 11 G. 3. c. 12. (a) and 57 G. 3. c. xxix. (b) in respect of land, within the streets of the paving district, in the possession of the Company and occupied by their mains, pipes, and other apparatus; and for the enjoyment of such land and of the right of laying their mains and pipes therein. A case was, by

Paving Commissioners,
appointed
under a local
Act, 11 G. 3.
c. 12., were
empowered,
by sect. 36,
to make rates
upon all per-
sons who

"shall inhabit,
hold, occupy,
possess or
enjoy any land,
house, shop,
warehouse,
cellar, vault

or other tenements or hereditaments within any of the said streets, squares" &c. of a certain district; such rate not to exceed 1s. 2d. in the pound of the yearly rents or value of such of the said lands, houses &c., situate in any of the said streets, squares &c., the greater part of which should be paved in a certain manner, and not to exceed 9d. or 6d. in the pound, respectively, for such of the said lands, houses &c., situate &c., the greater part of which should be paved in a certain other manner, or only repaired under the Act. Different assessments were provided for public buildings, dead walls, and vacant ground adjoining the said streets, squares &c., and for unoccupied houses. No specific assessment was provided for water pipes laid down in the district. The Commissioners, in whom the paving materials of the said streets, squares &c. were expressly vested by the Act, were empowered to alter the position of the pipes belonging to any water or gas company, underneath such streets, squares &c.

Held, that an incorporated water Company, whose mains, pipes and other apparatus were laid down within the district, were liable, under sect. 36, to be rated as occupiers of land.

(a) "For better paving the streets, squares, lanes, courts, alleys, ways, and other public passages, in that part of *Goodman's Fields*, which lies in the parish of *Saint Mary Matfellon*, otherwise *Whitechapel* in the county of *Middlesex*, and also *Red Lion Street* and *White Lion Street*, lying contiguous to the said *Fields*, and for removing and preventing nuisances, annoyances, and obstructions therein."

(b) Local and personal, public. "For better paving, improving and regulating the streets of the Metropolis, and removing and preventing nuisances and obstructions therein."

Volume XVIII. consent, and by order of *Crompton J.*, stated for the
1852. opinion of this Court, and was substantially as follows.

The QUEEN
v.
EAST LONDON
Waterworks
Company.

The appellants are an incorporated company, established, by Act of parliament, for the purpose of supplying parts of the eastern parts of the metropolis with water. Under their Act of incorporation, 47 G. 3. c. lxxii. (a), the Company are, by sect. 32, empowered to dig and break up the soil and pavement of any of the roads, highways, footways, streets and public places of certain parishes and places therein mentioned, including the said parish of *Saint Mary, Whitechapel*; and to sink and lay pipes, trunks and other conveniences, and to put stop cocks, or plugs or branches from such pipes, and other conveniences, in such places and in manner as shall be necessary for the purposes of the Act, and to do all such acts as the Company shall from time to time think necessary and convenient for completing, amending, repairing, improving and using the works authorized by the Act. The respondents are the Commissioners acting under and in pursuance of the said Acts, 11 G. 3. c. 12. and 57 G. 3. c. xxix., above mentioned.

By stat. 11 G. 3. c. 12. (b), the Commissioners are empowered to pave the streets and ways of the district, and, in certain cases, to make, alter and remove sewers, drains and grates, and to cause the streets and ways to be watered; and to perform certain other matters in the said Act specified. Sect. 36 is as follows.

(a) Local and personal, public. "For better supplying with water the inhabitants of the parishes of *Stratford Bow*, otherwise *Stratford le Bow*, *St. John Hackney*, *St. Mary Islington*, *St. Matthew Bethnell Green*, and several other parishes, hamlets, townships, and places adjacent or near thereunto, in the counties of *Middlesex* and *Essex*."

(b) As to the preamble, see p. 712, post.

"And for defraying the charges and expenses attending the execution of the several powers by this Act granted, be it further enacted that, from and after the passing of this Act, a rate or assessment, (over and above all rates and assessments now payable), shall, once in every year, or oftener if it shall be thought needful by the said commissioners or any seven or more of them, be made, laid and assessed by the said commissioners or any seven or more of them, upon *all and every person or persons who do or shall inhabit, hold, occupy, possess or enjoy any land, house, shop, warehouse, cellar, vault or other tenements or hereditaments within any of the said streets, squares, lanes, courts, alleys, ways or other public passages, for raising such competent sum or sums of money as the said commissioners or any seven or more of them shall from time to time think needful and direct, so as such rate or assessment, rates or assessments, do not in any one year exceed in the whole the sum of 1s. 2d. in the pound of the yearly rents or yearly value of such of the said lands, houses, shops, warehouses, cellars, vaults or other tenements or hereditaments respectively as shall be situate in any of the said streets, squares, lanes, courts, alleys, ways and other public passages, the greater part or parts of which said streets," &c. "respectively shall be actually begun to be paved with new or other stones of a flat surface by virtue or in pursuance of this Act, and not exceeding 9d. in the pound of the yearly rents or yearly value of such of the said lands, houses," &c. "or other tenements or hereditaments respectively as shall be situate in any of the said streets, squares," &c. "which shall be actually begun to be new paved, the footways whereof shall be constructed with new or flat stones, and the carriage ways thereof with the old stones which shall be taken up in the same or any other of the said streets, squares," &c. "by virtue or in pursuance of this Act, and not exceeding 6d. in the pound of the yearly rents or yearly value of such of the said lands, houses," &c. "or other tenements or hereditaments respectively as shall be situate in any of the said streets, squares," &c. "which shall only be repaired by virtue or in pursuance of this Act." (Other clauses were referred to in arguing the case, but need not be set forth here. See pp. 712, 713, post.)*

By sect. 24 of stat. 57 G. 3. c. xxix. it is enacted :

"That it may be lawful to and for the persons who, under any local Act or Acts of parliament for any parochial or other district within the jurisdiction of this Act, are empowered to make rates and assessments for the expenses of paving or keeping in repair the pavements of any streets or public places within such parochial or other districts, either separately or jointly with other purposes, from time to time and at all times after the passing of this Act, for and notwithstanding any provisions or restrictions, matters or things, in such local Act or Acts of parliament contained, to

Queen's Bench.
1852.

The QUEEN
v.
EAST LONDON
Waterworks
Company.

Volume XVIII. make and sign all and every or any su
1852. from time to time necessary or expec

The QUEEN
v.
EAST LONDON
Waterworks
Company.

pavements of the streets and public pl
district, pursuant to the direction of the
for such parochial or other district, or of
all debts or charges heretofore incurred
about the execution of such local Act
Act, or either of them, as to the paving
in such parochial or other district; and
annuities charged or chargeable on the
or other district, or for the payment of a
due in respect thereof, either separately
such persons shall seem reasonable and
in any one year double the sum or sums
the local Act or Acts of parliament for
the rate or rates in the pound which
charges of paving and repairing th
separately or jointly with any other
exception, as to amount, not material
assessments may be either substitute
directed by such local Act or Acts
in respect of the paving and keeping
parochial or other district, either separa
any other objects or purposes, or may b
making the said rates or assessments
thereof may determine and direct; and t
also all rates or assessments made and s
this Act, for and in respect of or to
pavements of the streets or public place
and either separately or jointly with
purposes, by virtue of any local Act or
this Act, shall be laid upon all and eve
shall inhabit, hold, occupy, be in poss
tenements, lands, grounds, coachhouse
shops, warehouses or other buildings w
within any of the streets or places in
district, and shall be just and equal pour
to the annual rents or value of such :
“warehouses or other buildings and he
that all rates or assessments hereafter :
made and signed and allowed and publ
the same manner as hath been directed :
ment relating to each particular paroch

or assessments for such parochial or other district for and towards the expenses of paving and repairing the pavements therein, and either separately or jointly with any other objects and purposes by such local Act or Acts of parliament."

Queen's Bench.
1852.

The QUEEN

v.
EAST LONDON
Waterworks
Company.

The respondents have paved and repaired the streets, ways and public places in the said district, and otherwise acted in execution of the several powers by the said Act of 11 G. 3. c. 12. granted.

The district of the said Commissioners is within the jurisdiction of the said Act of 57 G. 3. c. xxix.

The appellants are the owners and possessed of certain main and branch pipes, with the cocks and plugs belonging thereto, running under ground through the streets, squares, lanes, courts, alleys and other public passages in various parts of the district embraced by stat. 11 G. 3. c. 12., and within the limits of the jurisdiction of the respondents as such Commissioners (and which parts of the said district have been paved and repaired, and over which the said Commissioners have otherwise exercised the powers of the last mentioned Act), for the purpose of conveying water; and through which main and branch pipes water is conveyed by the appellants to the inhabitants of such district and others.

The plugs and stop cocks inserted in various parts of the said pipes are enclosed in smaller pipes, the extremities of which last mentioned pipes terminate in iron boxes, which rise to, and form part of, the surface of the said streets and ways and public places within which the same respectively lie, and are stamped with the letters E. L. W. W., being the initial letters of the words *East London Waterworks*.

Copies of the said Acts of parliament and of stat. 46

Volume XVIII.
1852.

The QUEEN

v.

EAST LONDON
Waterworks
Company.

G. 3. c. lxxxix. (a), and of the Acts amending the said Act of incorporation of the said Company, were to form part of the case.

The appellants have been possessed of their mains and pipes, with the plugs and cocks belonging thereto, within the district, for upwards of thirty years, and, until 1851, were never assessed to a paving rate or any rate whatever for the said district under the said Acts of 11 *G. 3. c. 12.* and 57 *G. 3. c. xxix.*, or either of them; but they have from time to time been assessed to and paid the rates for the relief of the poor and for the maintenance of the police, and the rates for lighting and cleansing the streets and other public places in the parish of *St. Mary, Whitechapel*, and the rate for repairing the church of the said parish, under stat. 46 *G. 3. c. lxxxix.*; by which Act, sect. 53, it is enacted that the rector, churchwardens, overseers of the poor and vestrymen, or any nine or more of them, shall make and sign three distinct rates or assessments, not exceeding the amount of the respective sums thereinbefore directed to be settled and ascertained, "upon all and every the person and persons who do and shall inhabit, hold, occupy, possess or enjoy any land, house, shop, warehouse or other building, tenement or hereditament;" that is to say, one rate for the relief of the poor, one other rate for the repair of the church, and one other rate for cleansing the streets and regulating a nightly watch in certain parts of the said parish.

(a) Local and personal, public. "For the better relief" &c. "of the poor within the parish of *St. Mary, Whitechapel*;" "for cleansing and lighting the squares and other passages and places, and keeping a nightly watch, for raising money for repairing the highways in certain parts of the said parish; and for raising money to repair the church of the said parish."

For the purposes of the case the form and amount of the rate or of the assessments on the Company, if the Company should be rateable, were not in dispute.

If the Court should be of opinion that the appellants were liable to be rated in respect of the said mains, pipes, plugs, cocks and apparatus on the pipes thereof, or in respect of any of them, or of the lands, ground or space which they or any of them occupy, the said rate was to be confirmed; if the Court should be of a contrary opinion, the rate was to be quashed, or amended by striking out the assessment on the appellants.

*Queen's Bench.
1852.*
The QUEEN
v.
EAST LONDON
Waterworks
Company.

Pashley, for the respondents. The words "hold, occupy, possess or enjoy any land," in sect. 36 of stat. 11 G. 3. c. 12., were intended to include such a holding, occupation, possession and enjoyment as that exercised by the Company in respect of their pipes and apparatus. In *Rex v. The Corporation of Bath* (*a*) it was held that a corporation owning reservoirs and pipes for water laid down in certain parishes were rateable, under stat. 43 Eliz. c. 2. s. 1., as occupiers of land in those parishes. *Rex v. Rochdale Waterworks Company* (*b*) and *Rex v. Brighton Gas Light Company* (*c*) are to the same effect. It would not be necessary, in order to make the Company rateable within stat. 43 Eliz. c. 2., that the principal machinery of the waterworks should be within the district; *Rex v. Foleshill* (*d*). And here the words "hold, occupy, possess or enjoy" are much wider than the words "occupier of lands" in stat. 43 Eliz. c. 2. The Company would, moreover, be liable, under stat. 11 G. 3. c. 12. s. 36., as occupiers of

(*a*) 14 East, 609.

(*c*) 5 B. & C. 466.

(*b*) 1 M. & S. 634.

(*d*) 2 A. & E. 593.

inhabitants of the said streets, squares" &c. "are willing *Queen's Bench.*
to pave the same at their own expence;" and that this *1852.*
cannot be effected without the aid of Parliament. That
shews that the intention of the Act was to impose a
rate only on the actual inhabitants, who would be bene-
fited by the improvements. The Company are not
within this class. Sects. 42, 44, which provide for a
smaller proportionate assessment upon public buildings,
dead walls and void spaces of ground within or adjoining
the said streets, squares &c., and upon houses which
have been unoccupied during a part of the time
elapsed since the last rate, shew that it was intended
that the assessment should be distributed according
to the amount of benefit arising from the paving to
the parties assessed. The Company derive no benefit.
If it had been intended to rate them in respect of
their pipes, these would have been expressly men-
tioned in the rating clause. They are so mentioned
in sects. 14—19, where provision is made for taking
up pavements to repair them. Under sect. 19 the
Commissioners have power to alter the position of the
Company's pipes. The Company, therefore, have no
interest in the land beyond a mere easement. [Lord
Campbell C. J. They may have a moveable freehold.]
The sewers would be rateable, if the pipes were rate-
able. The nature of the Company's interest is still
further explained by the provisions of stat. 57 G. 3.
c. xxix. By sect. 11 no water Company can take up
the pavement for the purpose of laying down pipes
without notice to the Commissioners. By sects. 12—15
materials, arrangement and repairs of all water pipes
underneath the soil are subject to the supervision and
controul of the Commissioners. [Lord *Campbell C. J.*

The QUEEN
v.
EAST LONDON
Waterworks
Company.

Volume XVIII. I do not see how this affects the question at issue.
1852.

The QUEEN
v.
EAST LONDON
Waterworks
Company.

That depends simply upon the construction of the rating clause, stat. 11 G. 3. c. 12. s. 36.] Several provisions of the local and general Acts are important as shewing that the Company cannot be said to occupy, possess or enjoy land, within the meaning of the rating clause. By sect. 52 of stat. 57 G. 3. c. xxix. the pavements and other materials of the streets are vested in the Commissioners. [*Erle* J. But the land beneath the pavement is occupied by the Company. It may, however, be a question whether by "land," in the rating clause, is meant other than surface land. It has been held that mines are exempt from taxation under stat. 43 Eliz. c. 2., except coal mines, which are expressly mentioned. Here the rating clause provides that the parties liable are to be assessed at different rates according to the nature of the pavement. It would therefore be necessary, if the pipes are rateable, to calculate what portion of them lay under each description of pavement.] That would be almost impossible; and therefore it is clear that by "land" was meant only the surface.

Pashley, in reply. The difficulty suggested as to making different assessments on different portions of the pipes exists, in some degree, with respect to houses, which are clearly rateable. The Company derive a profit from the use of the land, and "enjoy" it within the meaning of the rating clause. Indeed they could bring an action of trespass quare clausum fregit for an interference with their pipes by any one not authorized under the Acts. In *Crease v. Sawle* (*a*) the Court intimated that, in stat. 43 Eliz. c. 2., it was

intended, by the words "every occupier of lands," to include all occupiers of any description of real estate. *Queen's Bench*.
1852.

As to the pipes not being expressly mentioned in the rating clause, that is because the word "land" would include the pipes laid down in it. [Erle J. Would the Commissioners of Sewers be rateable in respect of their drains?] They would not, because they derive no profit from their occupation. [Lord Campbell C. J. They are in much the same position as the surveyors of highways.] Here the Company have a direct interest. (He was then stopped by the Court.)

The QUEEN
v.
EAST LONDON
Waterworks
Company.

Lord CAMPBELL C. J. I am of opinion that the Company are rateable. By sect. 36 of stat. 11 G. 3. c. 12. the rate is to be laid on all persons who "shall inhabit, hold, occupy, possess or enjoy any land, house," &c., "tenements or hereditaments within any of the said streets, squares," &c. Now, by stat. 43 *Eliz. c. 2.*, by which real property is made rateable to the poor, the rate is to be laid on "every occupier of lands," among others; and we are entitled to give the same definition of occupation of land, in stat. 11 G. 3. c. 12., as has been given to it in stat. 43 *Eliz. c. 2.* By a long series of cases it has been decided that water Companies or gas Companies are, under the latter statute, rateable, as occupiers of land, in respect of their pipes which are laid beneath the soil; and we are therefore justified in holding that the Company here are also rateable, in the same character, under stat. 11 G. 3. c. 12. In *Rex v. Manchester and Salford Waterworks Company* (a) a water Company was held not to be rateable under a local Act, because the

(a) 1 B. & C. 630.

to the former than to the latter, as we did in *Rex v. Queen's Bench.*
Manchester and Salford Waterworks Company (*a*) and *1852.*
East London Waterworks Company v. Trustees for Mile *The QUEEN*
End Old Town (*b*). Judgment must therefore be for the *v.* *EAST LONDON*
respondents. *Waterworks*
Company.

ERLE J. The Company are clearly rateable as occupiers of land. I have looked carefully through the local Act, and cannot find anything which restricts the nature of the occupation.

CROMPTON J. The only cases cited, where a Company has been held not rateable under these circumstances, are where the word "land" was not in the rating clause. Here all occupiers of land are expressly made rateable. I was at first rather struck with my brother Erle's suggestion of the difficulty which would arise in apportioning the assessments upon different portions of the pipes; but I do not think that difficulty sufficient to rebut the clear inference to be drawn from the language of sect. 36.

Judgment for the respondents.

(*a*) 1 B. & C. 630.

(*b*) 17 Q. B. 512.

Volume XVIII.
1852.

Thursday,
June 3d.

The QUEEN against The Vicar, Churchwardens and Inhabitants of HILLINGDON.

At a vestry, held under stat. 58 G. 3. c. 69., for the purpose of electing surveyors of highways, of which public notice had been given, it was agreed that the vote should be taken by a shew of hands, leaving it open to any one to propose that the votes should be taken according to the statute. A. and B. were respectively proposed and seconded for the office of surveyor; and, on a shew of hands, A. had a majority. It was then proposed and seconded, on behalf of B., that the votes should be taken according to the statute. No objection was made; and, on the votes being so taken, B. had a majority, and was declared duly elected. A. then demanded a poll of the whole parish.

Held that, the meeting having agreed to a poll being taken according to the statute, no one was entitled afterwards to demand a poll of the whole parish; that the election of B. was valid; and that a mandamus for another meeting to elect would not lie.

PASHLEY, in last *Easter* term, obtained a rule calling on the vicar, churchwardens and inhabitants of the parish of *Hillingdon*, in the county of *Middlesex*, to shew cause why a mandamus should not issue commanding them to assemble themselves in vestry for the purpose of electing a surveyor of the highways for the said parish.

From the affidavits it appeared that the parish of *Hillingdon* is divided into four districts, and that it has been usual to elect one ratepayer residing in each to be the surveyor of the highways in that district.

On 27th *March* 1852, public notice was given that a vestry would be held on the 2d *April* following, "to elect surveyors of the highways for the year ensuing" and for other purposes. The vestry was held on the day appointed. At the commencement of the proceedings it was proposed and seconded that the votes of the vestry should be taken according to stat. 58 G. 3. c. 69. (*Sturges Bourne's Act*) s. 3.; but the motion was withdrawn upon a proposal, by the vestry clerk, that the votes should be taken by a shew of hands in the first instance, leaving it open to any inhabitant to propose that the votes should be taken according to the statute.

Held that, the meeting having agreed to a poll being taken according to the statute, no one was entitled afterwards to demand a poll of the whole parish; that the election of B. was valid; and that a mandamus for another meeting to elect would not lie.

Certain proceedings having then been carried by a shew of hands, without dissent, two ratepayers, *Haynes* and *Roadnight*, were respectively proposed and seconded for the office of surveyor of highways for a particular district. A shew of hands was taken, upon which *Haynes* had a majority. It was then proposed and seconded, on behalf of *Roadnight*, that the votes should be taken according to Act of parliament. This was done; and *Roadnight* had a majority. *Haynes* then demanded a poll of the whole parish: but the vicar, as chairman, declined to grant it, the vestry clerk having stated that *Haynes* ought to have demanded a poll at an earlier stage of the proceedings, and that the reckoning of the votes according to the statute completed the election.

The affidavits also stated that there is no select vestry for the parish; and that the vestry clerk is appointed under stat. 13 & 14 Vict. c. 57. (a).

J. Gray now shewed cause. The application for a poll of the whole parish was made too late. It should have been demanded after the shew of hands; *Campbell v. Maund* (b). The functions of the vestry were discharged as soon as the votes of the ratepayers present had been taken according to the statute. That is, in effect, a polling of the ratepayers: and, if the ratepayers present in vestry elect to have recourse to that form of poll, a poll of the whole parish cannot be afterwards demanded; *Campbell v. Maund* (b). It was decided, in *Regina v. The Rector of Lambeth* (c), that, although, at a polling in vestry, all qualified persons are entitled to come in and vote, a polling of only the ratepayers pre-

Queen's Bench.
1852.

The QUEEN
v.
Vicar of
HILLINGDON.

(a) "An Act to prevent the holding of vestry or other meetings in churches, and for regulating the appointment of vestry clerks."

(b) 5 A. & E. 865.

(c) 8 A. & E. 366.

election was valid, and that a mandamus will not lie for another meeting to elect. There is no doubt that any ratepayer present at the vestry may appeal from the decision upon a shew of hands to a polling of the ratepayers; but, if that polling is, with the consent of all present, confined to the ratepayers assembled at the vestry, any subsequent demand that a poll of all the ratepayers in the parish should be taken is wholly illegal.

*Queen's Bench.
1852.*

The QUEEN
v.
Vicar of
HILLINGDON.

COLERIDGE J. The question here is, not what is the general rule of voting at vestries, or what course might have been followed in the present instance, but whether, under the circumstances, the party applying for the mandamus has any right to set aside the proceedings that were actually taken. I am of opinion that he has not. He should have made his call for a poll of the whole parish immediately upon the shew of hands; he was not entitled to demand it after having acquiesced in the taking a poll of those ratepayers only who were present. That form of poll is, in itself, perfectly legal; and the election was a valid one.

WIGHTMAN J. Public notice was given that a vestry would be held; and it must be taken that all the ratepayers who were interested attended. No objection was made when a poll of the ratepayers in vestry was proposed; and therefore a poll of the whole parish could not be afterwards claimed by any one there, the meeting having elected to have recourse to the more limited form of poll.

ERLE J. concurred.

Rule discharged with costs.

"80*l.*, at 3*l.* per cent. interest, with fourteen days' notice."

Queen's Bench.

1852.

TIMMINS
v.
GIBBINS.

The *Stourbridge* notes were sent to *Jones, Loyd, & Co.*, the agents of the Company, by the evening post on 26th *June*, and presented by them, on 27th *June*, at Messrs. *Glyns*'. Payment was refused. The Company received them back on 28th *June*, and, on that day, sent notice of their dishonour to the female plaintiff. The *Stourbridge* Bank paid up to the close of banking hours on the 26th *June*, but did not open afterwards. On 13th *January*, the plaintiffs gave fourteen days notice of withdrawal, when the Company tendered the notes, which the plaintiffs refused. The plaintiffs, on 29th *January*, demanded payment, which was refused by the Company. The learned Judge directed a verdict for the defendant, with leave to move to enter a verdict for the plaintiffs for 65*l.* *Keating*, in last Easter Term, obtained a rule nisi accordingly.

Alexander and *Chance* now shewed cause. The Company are not liable for the amount of the notes. *Camidge v. Allenby* (*a*) will be relied on; but there the party receiving the notes had been guilty of laches in not taking the proper steps to get them cashed, or returning them promptly to the party from whom he received them. The obligation incumbent on the holder in such a case appears in *Rogers v. Langford* (*b*) and *Turner v. Stones* (*c*). Here the Company lost no time in presenting the notes for payment in *London*, and informing the plaintiffs of their dishonour. The loss ought therefore to fall upon the plaintiffs.

(*a*) 6 *B. & C.* 373. See *Robson v. Oliver*, 10 *Q. B.* 704.

(*b*) 1 *Cr. & M.* 637. *S. C.* 3 *Tyr.* 654. (*c*) 1 *Dowl. & L.* 122.

by the plaintiffs here.] Here the notes were simply deposited with, and received by, the Company as and for cash, the Company agreeing to pay the amount at fourteen days' notice. [Wightman J. Can the plaintiffs sue for money had and received? Payment of the notes having been refused, the Company would be entitled to answer that they had not received any money.] Ward v. Evans (a) decides that an action for money had and received will lie under such circumstances. Money deposited with a banker is equivalent to money lent to him; Pott v. Clegg (b); and, for the reasons already stated, the deposit of the notes in the present case is equivalent to a deposit of money. An action lies here, therefore, either for money lent or money had and received.

Queen's Bench.
1852.

TIMMINS
v.
GIBBINS.

Lord CAMPBELL C. J. I am of opinion that the plaintiffs are not entitled to bring an action either for money lent or for money had and received. No doubt, at the time of the deposit, both parties believed that the Stourbridge Bank was solvent, and that these notes were valuable securities. It turned out, however, that they were worthless. No laches can be imputed to the Company; for they sent the notes to London immediately upon receiving them, and gave notice of their dishonour to the female plaintiff immediately upon receiving such notice themselves. The case is the same as if the Stourbridge Bank had been insolvent long before the day on which the notes were deposited, and neither party had been aware of it. There are no grounds which will support a count either for money lent or money had and received, because there is a failure of the consideration upon which the defendant's promise would be

fails; and the plaintiffs, therefore, have no ground of action in respect of such promise. They must, upon whichever count they rely, shew that money was received by the Company from the female plaintiff. *Prima facie* the receipt shews that; but the defendant is at liberty to prove that it was given under a mistake of fact.

Queen's Bench.
1852.

TIMMING
v.
GIBBINS.

WIGHTMAN J. I adhere to the opinion which I formed at the trial, that the plaintiffs cannot recover on either count. The count for money had and received would be the most appropriate, provided they could recover at all. The female plaintiff offered to deposit with the Company certain alleged securities, which were assumed by both parties, at the time, to be worth 65*l.*, and for the amount of which, upon that assumption, the Company agreed to be accountable. It turned out that they were worth nothing; but that was through no fault of the Company. The consideration, therefore, for the agreement on the part of the Company failed altogether, and they are not liable to an action in respect of that agreement. The case is quite different from that suggested of a transaction amounting to a purchase of the note; here nothing took place which could possibly be called a purchase. Some nice distinctions were taken between notes paid in discharge of an antecedent debt, and notes paid at the time of the purchase, in which latter case, it was contended, the doctrine of *caveat emptor* would apply. It is not, however, necessary for us to decide that point, as here there was no sale at all between the parties.

(**ERLE J.** had left the Court during the argument.)

Rule discharged.

Queen's Bench.
1852.

WILKINSON
v.
ANGLO
CALIFORNIAN
Gold Mining
Company.

10s. for and in respect of each of the said twenty shares so subscribed for by him. And that, after the complete registration of defendants as such Company as aforesaid, and before the committing of the grievances aforesaid, and whilst the plaintiff was such subscriber as aforesaid, "the plaintiff duly executed the said deed of settlement under which the defendants as such Company were formed as aforesaid, except as to the said therein and hereinbefore mentioned provision designated by the number of 179 as aforesaid," of which the defendants had notice; and plaintiff then, and after the defendants were completely registered, became and was entitled, under and by virtue of the said statute and of the premises aforesaid, to have made out by the defendants a certificate of the proprietorship of each of the before mentioned shares for which plaintiff had so subscribed, and to have such certificate with the common seal of the defendants affixed thereto delivered to him, on demand. Breach: that the defendants refused to give such certificates, though requested.

Plea. That the formation of the said Company was commenced after 1st November A. D. 1844, and that it was a Company within the operation of the Act of parliament in the declaration mentioned; and that plaintiff had not at the time of the committing of the alleged grievances executed the deed of settlement of the said Company, or any deed referring thereto. Verification.

Special demurrer, on the grounds (among others) that the plea did not confess that the plaintiff executed the deed of settlement, and that it contained an argumentative traverse of the execution alleged in the declaration.

Joinder in demurrer.

entitled to a share in a Company, and who has executed the deed of settlement, or a deed referring to it." When I was at the bar it was considered prudent in cases like the present to add a breach for not permitting the plaintiff to execute the deed of settlement. The question now raised seems to be whether that was necessary, or merely a measure of precaution.] The interpretation clause puts an arbitrary meaning on the word "shareholder;" but it leaves the phrase "holder of shares" to bear its ordinary meaning. Sect. 52 shews that a person may be a holder of shares without any certificate: sect. 26 that he may be a "shareholder" before executing the deed, though he is restricted in his powers and privileges till he does.

Then, even supposing the execution to be a condition precedent, performance is here averred; and the plea is bad as being an argumentative traverse of that averment. [*Per Curiam.* It is impossible in law to execute a deed in part only. There is therefore no allegation of execution; and the only question on this record is whether such an allegation was necessary.]

Willes, for the defendants. By sect. 26 it is provided, "with regard to subscribers and every person entitled or claiming to be entitled to any share in any joint stock company the formation of which shall be commenced after the 1st day of *November* 1844, that until such joint stock company shall have obtained a certificate of complete registration, and until any such subscriber or person shall have been duly registered as a shareholder in the said registry office, it shall not be lawful for such person to dispose, by sale or mortgage, of such share, or of any interest therein, and that every contract for or sale or disposal of such share or interest shall be void,

Queen's Bench.
1852.

WILKINSON
v.
ANGLO
CALIFORNIAN
Gold Mining
Company.

matter, that meaning is required by it; for otherwise the company would be compelled to create *prima facie* evidence enabling a person who had not subscribed the deed to mislead others, who on the faith of the certificate would believe he was a shareholder.

Queen's Bench.
1852.

WILKINSON
v.
ANGLO
CALIFORNIAN
Gold Mining
Company.

Paterson was heard in reply.

Lord CAMPBELL C. J. I am of opinion that the defendants are entitled to judgment. The question turns entirely on the construction of the statute. Looking to sect. 51, by itself, without the aid of the rest of the Act, I should say that the plaintiff was entitled to judgment, as that section gives to the shareholder an absolute right to the certificate on demand, and the plaintiff is what in the ordinary meaning of the word would be understood by a shareholder. But the Legislature has enacted (sect. 3) that in this Act certain "words and expressions are intended to have the meanings" thereby assigned to them "so far as such meanings are not excluded by the context or by the nature of the subject matter." Among those words we find that "shareholder" is to mean a person who is entitled to shares and has executed the deed. Now, if we assign that meaning to the word in sect. 51, we make it give the right of demanding a certificate to such persons only as are entitled to shares and have executed a deed. There is nothing in the context or the subject matter to exclude this meaning; and therefore we must give it to the word here. In the beginning of sect. 26 the word "shareholder" is used as applicable to persons who have not executed the deed; and it would seem repugnant to attach the statutable meaning to the word

section that the right to a certificate is given to the person demanding it, he being a shareholder. Then sect. 3 says that shareholder shall mean a person entitled to shares, who has executed the deed. The declaration does not shew that the plaintiff is such a person, and it is therefore bad. The plea alleges that he is not such a person; and it is good.

It seems to me that this construction is consistent with the whole scheme of the Act. The Act distinguishes between inchoate shareholders, who have not executed any deed, who in sect. 3 are called "subscribers," and complete shareholders who have executed the deed, and who in sect. 3 are called "shareholders." One great object of the Act was to put obstacles in the way of those who wish to play fast and loose, to take the benefit of the shares without being liable to pay calls. Therefore "subscribers" are neither to obtain benefit themselves nor to transfer their shares to others till they have executed the deed and so become liable to calls. Another object was to furnish facilities of evidence for those who were shareholders. Now, if a mere subscriber was entitled to certificates, which, by sect. 52, are *prima facie* evidence that he is a shareholder, the object of the Act would be frustrated, as he might go into the market with false evidence of his title.

CROMPTON J. I am of the same opinion. The facts stated in the declaration shew that the plaintiff is what the Act means by "subscriber," not what is there meant by "shareholder." And I quite agree that there is nothing to exclude the statutable meaning of "shareholder" in sect. 51. It is argued that the meaning is excluded by the context in sect. 26. It seems to me very doubtful

Queen's Bench.
1852.

WILKINSON
v.
ANGLO
CALIFORNIAN
Gold Mining
Company.

Queen's Bench.
1852.

STEWART
v.
ANGLO
CALIFORNIAN
Gold Mining
Company.

the times of the committing &c., viz. on &c., plaintiff became and was and still is entitled to 240 shares in the capital or joint stock of the defendants; and also, before and at the times of the committing &c., and after defendants had completely registered under the said Act of parliament, to wit on &c., plaintiff, being so entitled to the said shares as aforesaid, became and was entitled, under and by virtue of the said statute, to have made out by defendants a certificate of the proprietorship of each of the before mentioned shares to which plaintiff was so entitled as aforesaid, specifying therein respectively the share to which plaintiff was entitled, and the amount paid up in respect of such share at the date of such certificate; and to have such certificate, with the common seal of the defendants affixed thereto, delivered to him the said plaintiff on demand: And, although afterwards, and before and at the time of the committing &c., and before the commencement of this suit, and whilst plaintiff was so entitled to the said shares as aforesaid, to wit on &c., he the plaintiff was ready and willing, and from thence hitherto hath always been and continued to be ready and willing, to execute the deed of settlement hereinbefore mentioned, and under which the defendants as such company are formed as aforesaid; of which defendants during all the time aforesaid had due notice, and were then requested by plaintiff to suffer and permit plaintiff to execute such deed of settlement as aforesaid: And although also, after plaintiff had become, and whilst he was, entitled to the said shares as aforesaid, and before the committing &c., to wit on &c., plaintiff did, pursuant to the said statute, demand of defendants that they should cause a certificate of the proprietorship of each of the before mentioned shares to be delivered to plaintiff as

certificate of the proprietorship of each of the said shares as in the declaration mentioned, or to have such certificate with the common seal of the defendants affixed thereto delivered to him on demand, in manner and form &c.

Queen's Bench.
1852.

STEWART
v.
ANGLO
CALIFORNIAN
Gold Mining
Company.

4. As to the parts of the declaration excepted in the preceding plea: That the plaintiff was not ready and willing to execute the said deed of settlement, in manner and form &c.

5. As to the same parts of the declaration: That defendants were not requested by plaintiff to suffer or permit plaintiff to execute the said deed of settlement, in manner and form &c.

Issues to the country were joined on all the pleas.

The cause was tried before Lord *Campbell* C. J., at the *Middlesex* sittings after last *Hilary* Term. The material facts proved were stated by his Lordship, when delivering judgment in this Court on the after mentioned motion, as follows.

"It appeared that this Company was provisionally registered in *August* 1850: that in *June* 1850 the plaintiff obtained certain scrip receipts for shares in the Company; that the deed of settlement was completed and executed by one fourth of the shareholders on the 16th of *August* 1851; that it contained a clause which authorized the directors to declare forfeited the shares of any scrip holders who should not execute the deed within three months from its date; that, after the expiration of three months from the date of the deed, and before the plaintiff requested that he might be permitted to execute the deed, the directors (*a*) declared his shares to be forfeited; that he had no previous notice from the

(*a*) By resolution of *November* 18th, confirmed on 21st.

Volume XVIII. Company to come in and sign the deed (*a*); that the
 1852. Company was completely registered in *November* 1851; and that afterwards the Company refused leave to the plaintiff to execute the deed, on the ground that his shares were forfeited.

STEWART
 v.
 ANGLO
 CALIFORNIAN
 Gold Mining
 Company.

By the 6th and two other clauses of the deed it was provided :

“That the whole of such sum of 10*s.* per share shall be paid up within 21 days after the complete registration of the Company.”

“That if any subscriber for shares in the capital of the Company shall not within the period of 21 days after the complete registration of the Company have paid the full amount of 10*s.* upon the shares subscribed for by him” (*b*), “it shall be lawful for the board of directors by a minute in writing under the common seal of the Company to declare that the share or shares in respect of which such full amount shall not have been paid,” “and all the benefits and advantages whatsoever attending the same, shall thenceforth be forfeited to the Company; and upon such declaration the same shall be forfeited accordingly.”

“That, notwithstanding the dates of the respective execution of these presents by the respective parties hereto, the contract intended to be effectuated by these presents shall be held to have commenced as” (*sic*) “and from the day and year first above written” (16th *August* 1851, the date of the deed); “and that the share or shares of every subscriber for any part of the capital

(*a*) There was a notice in fact; but it was not given till *November* 15th, the day fixed for signing the deed being the 16th. See p. 749, post.

(*b*) The provision included also persons not paying instalments, to whom, however, a right of appeal was given.

of the Company who shall not execute these presents *Queen's Bench.*
within three months from the day of the date hereof
shall be forfeited if the board of directors shall think fit,
and the amount paid upon such share or shares shall
become the property of the Company."

1852.

STEWART
v.
ANGLO
CALIFORNIAN
Gold Mining
Company.

It was contended on behalf of the defendants that, although no notice should have been given to execute the deed, the directors might, under the clause last above mentioned, declare the plaintiff's shares forfeited. A verdict was found for the plaintiff on all the issues, leave being reserved to move that a verdict for the defendants might be entered on the second and third.

Bramwell, in last *Easter* Term, moved that the verdict might be entered accordingly. The defendant was not entitled to the shares, as he claims to have been on the second issue, if they were duly forfeited. Nor was he entitled to have a certificate of the shares, as he asserts on the third issue: that is the right of a shareholder, under stat. 7 & 8 Vict. c. 110. s. 51.; and a "shareholder," by sect. 3, is a "person entitled to a share in a Company, and who has executed the deed of settlement." Notwithstanding the defective notice the shares were duly forfeited; for no notice at all was necessary. There is no person to whom the duty of giving it is assigned by the statute. The regulation, that shares shall be forfeited if the holder does not execute within three months, is not unreasonable; nor, indeed, does the plaintiff except to it; for he states that he was willing to sign the deed. The statute gives no appeal against such a deed, but there are securities against any unreasonableness in the clauses; for, first, it must (by sect. 7) be signed by one fourth of the subscribers, and,

A rule nisi was granted on the first point; refused on *Queen's Bench.*
the two others. In this term (*a*), *1852.*

Edwin James, Paterson and *John Thompson* shewed cause. The notice was clearly insufficient: and, assuming that the framers of the deed might make such a rule as the defendants rely upon for the purpose of forfeiting shares, it is to be inferred, even from the terms of the rule itself, that some reasonable notice was to be given. The directors have an option to exercise, and must make known how they propose to exercise it. This is determined, in principle, by *Vyse v. Wakefield* (*b*). The Joint Stock Bank Act, 7 & 8 Vict. c. 113. s. 38., expressly requires that, before declaring any share forfeited, the directors shall give notice, and the course to be pursued is pointed out. [Lord Campbell C. J. The Legislature expresses the intention in one instance and not in the other. Crompton J. The statute there gives the power to forfeit: here the directors give it to themselves. Wightman J. The clause seems not an unreasonable one. Lord Campbell C. J. It forms part of a registered deed.] The deed cannot lawfully contain more than stat. 7 & 8 Vict. c. 110. authorizes. The framers of this forfeiting clause have exceeded the power given by sect. 7, which directs that the deed of settlement shall "make provision for such of the purposes set forth in schedule (A.) to this Act annexed as the nature and business of the Company may require." The only forfeiting clause authorized by the schedule is (32) "for determining whether, on

(*a*) April 29th; Before Lord Campbell C. J., Wightman, Erle and Crompton Js. And May 5th; before the same Judges.

(*b*) 6 M. & W. 442. Judgment affirmed in Exch. Ch., *Vyse v. Wakefield*, 7 M. & W. 126.

STEWART
v.
ANGLO
CALIFORNIAN
Gold Mining
Company.

the plaintiff entitled to any shares if the scrip was forfeited? *Wightman* J. If the shares were forfeited he had no right to shares at the time of action brought.]

Queen's Bench.
1852.

STEWART
v.
ANGLO
CALIFORNIAN
Gold Mining
Company.

Bramwell and *J. Gray*, contra. The question is, whether the Company had power to forfeit the shares. [Lord *Campbell* C. J. And duly exercised it.] They were not bound by the deed to give notice: and the deed is not unreasonable in this respect. There is no allegation on the record that three months were not a reasonable time for signature; nor does any thing appear in the case which can enable the Court to pronounce that the time allowed for that purpose was not reasonable. At all events the deed ought to be binding, after it has passed through the several checks provided by stat. 7 & 8 Vict. c. 110. s. 7., and has been executed by other shareholders, who would not perhaps have subscribed if the deed had been different, or if they had known that others would refuse. It would be highly inconvenient if shareholders might, for an indefinite time, reserve the power of objecting severally to particular clauses. And it is unjust that, while some have subscribed and thereby made themselves liable to executions, others should be allowed to lie by, for the purpose, it may be, of watching how far the project succeeded, and incur only the suspension of their dividends. The clause in question does not forfeit the shares absolutely, but gives a discretionary power to the directors. It cannot rationally be suggested that the small sums paid as deposits would induce them to insert or to act upon a clause of forfeiture. [Lord *Campbell* C. J. The shares might be bearing a premium.] *Ashpitel v. Sercombe* (a)

(a) 5 Exch 147.

he must take his remedy by action against those whose duty it is to prepare it. In *Clements v. Todd* (*a*), where the Company's scheme had proved abortive, and the plaintiff had obtained scrip certificates, undertaking to sign the subscribers' agreement and parliamentary contract when required, but had not signed either, it was held that he could not on that ground recover his deposit money back. [Crompton J. If the party may repudiate such a deed as this, is not he also at liberty to come in and sign it? Lord Campbell C. J. Tale quale.] The plaintiff ought to have done one act or the other. [Lord Campbell C. J. You hold him bound by the deed but refuse to let him sign it.] Taking the deed as it is, the forfeiture is justified by it. Again, the plaintiff cannot maintain a claim to "shares" properly so called, since he could not be a "shareholder" according to stat. 7 & 8 Vict. c. 110. s. 3., without having executed the deed. [Lord Campbell C. J. The rule to shew cause was granted, substantially, upon the question of forfeiture.]

Queen's Bench.
1852.

STEWART
v.
ANGLO
CALIFORNIAN
Gold Mining
Company.

Cur. adv. vult.

Lord CAMPBELL C. J., in the ensuing vacation (June 18th), delivered the judgment of the Court.

In this case a rule was granted on the point reserved, whether there was evidence to prove that, before the plaintiff requested that he might be permitted to execute the deed of settlement, his shares in the Company were duly forfeited? If they were, the defendants are entitled to have the verdict entered for them on the issue on the second plea, that the plaintiff was not possessed of the shares.

(*a*) 1 Exch. 268.

against the law of the land. This is an action for not being permitted to execute the deed; and the plaintiff must be supposed to have availed himself of his opportunities of becoming acquainted with its contents, and to have sanctioned it as it stands. If the deed contained anything contrary to the prospectus, or justly objectionable, he might possibly recover back the sums he has paid for his scrip from the individuals with whom he dealt: but in the action against the Company for not permitting him to execute the deed he cannot object to it as unreasonable.

*Queen's Bench.
1852.*

STEWART
v.
ANGLO
CALIFORNIAN
Gold Mining
Company.

Then, as to the want of notice. The evidence was that he had no notice till the day before the time expired, which the jury found not to be sufficient; and the case stands as if he had received no notice. But no notice is required to be given by the deed, which confers upon the directors the absolute power to declare forfeited the shares of the subscribers who do not execute it within three months from its date. Therefore, if the deed be valid, no notice was required. In truth the subscribers had ample means of becoming acquainted with the peril which they ran of their shares being forfeited: but some of them may have delayed their application to execute the deed (an act which would render them liable for calls), till they saw that the concern was likely to be prosperous and that shares were at a premium.

In this action we thought that the plaintiff's title to *shares*, in the sense in which the word is used in the declaration, could not be denied on the ground that he has not executed the deed and therefore could not be a shareholder within the definition of the term in the interpretation clause: but, as the shares were duly

Queen's Bench.
1852.

Ex parte ROSE, D.D.

Monday,
June 7th.

SIR *A. J. E. Cockburn*, Attorney General, moved that a writ of prohibition might issue, to prohibit the Lord Bishop of *Oxford* from proceeding in execution of the after mentioned sentence against Dr. *Rose*, who stated the following facts on affidavit.

Dr. *Rose* was incumbent of the rectories of *Woughton* and *Little Woolston*, both in *Buckinghamshire*. In November, 1848, a report was circulated that he had been guilty of adultery; and Dr. *Rose* thereupon prayed the Bishop of *Oxford*, in whose diocese the livings were, to order a commission of inquiry under the Church Discipline Act, 3 & 4 Vict. c. 86. s. 3. The Bishop assented; and a commission was issued, Dr. *Rose* undertaking (on the requisition of the Bishop's secretary) to guarantee the Bishop against all costs. The Commissioners reported to the Bishop that there was prima facie ground for instituting proceedings against Dr. *Rose*; and thereupon Dr. *Rose*, after an interview and correspondence with the Bishop, consented, on his Lordship's suggestion, that sentence should be pronounced, under sect. 6 of the statute, without further proceedings. Dr. *Rose* at the same time made a protestation of his innocence, which he now repeated on affidavit. The Bishop, on March 4th, 1849, sequestered Dr. *Rose*'s livings, and issued a decree of suspension, whereby, off; and that the suspension shall continue, notwithstanding the expiration of the term, until such approval.

Where a beneficed clergyman charged with an offence by report of Commissioners under sect. 5 of the Church Discipline Act, 3 & 4 Vict. c. 86., consents, under sect. 6, to abide the judgment of the Bishop without further proceedings, and is thereupon sentenced to suspension from the functions and emoluments of his office for a term of years, the Bishop may lawfully make it a part of such sentence that, when the term expires, the suspended party shall produce a certificate of his good behaviour during such term, under the hands of three beneficed clergy-men in his vicinity, such certificate to be approved of by the Bishop before the suspension be taken.

Queen's Bench.
1852.

Ex parte
Rose.

morals." The Bishop considered the testimony of two of the certifying clergymen unsatisfactory, for reasons which he assigned; and he refused to accept the certificate as a compliance with his decree. Further attestations were offered, but were also deemed insufficient; and the suspension was continued, the Bishop offering, upon terms specified, to allow Dr. *Rose* the surplus income of the livings after paying curates and other necessary expences. The affidavit contained statements controverting the Bishop's objections, and represented that, if they prevailed, it would be impossible for the deponent to procure a certificate duly attested, inasmuch as the neighbouring parishes of which the incumbents had not been excepted to had been without resident incumbents during the whole of the last three years.

Sir *A. J. E. Cockburn* now contended that the sentence was illegal, as it made Dr. *Rose*'s restoration to his livings depend upon a condition which might render the suspension perpetual. [Lord *Campbell* C. J. A Court of common law imprisons till a certain time and till sureties are found. *Coleridge* J. The sentence here might have been deprivation.] Still, if the Bishop chooses to punish by suspension, it must be conformably to the rules of ecclesiastical law. By stat. 3 & 4 Vict. c. 86. s. 6., the sentence given by consent is not to exceed that which might be pronounced in due course of law. In *Watson v. Thorp*(a) a sentence like the present (pronounced in Court) was affirmed by the Court of Delegates: but "the Court doubted as to the requiring the certificate; and also as to its being required that the certificate should be approved of by the Judge; considering,

(a) 1 *Philim. Ecc. Rep.* 269, 279, note (a).

motion. We must consider Dr. *Rose* as guilty on this charge. A *prima facie* case is reported against him. He acknowledges himself guilty; or at all events he submits to sentence. That sentence does not exceed the judgment which might have passed if he had been convicted in course of law, and which might have been deprivation. The punishment itself is not unreasonable. But then the Bishop allows the suspension to terminate at the end of three years, on condition that Dr. *Rose* produce a certificate by three clergymen, such certificate to be approved by the Bishop. Does that exceed the sentence "which might be pronounced in due course of law?" I think not, and that the condition is most reasonable. It leaves a *locus poenitentiae* at the end of three years: the punishment might have been a severer and a final one. I think the power which has been exercised by the Bishop belongs to him; and no authority has been shewn to the contrary. It was exercised in *Watson v. Thorp* (a); and the doubt intimated there is not a decision. The power, in my opinion, exists, and has been wisely exerted.

*Queen's Bench.
1852.*

*Ex parte
Rose.*

COLERIDGE J. It appears by the books of ecclesiastical law that offences may be punished by suspension ab officio or a beneficio, or ab officio et beneficio jointly, which are temporary deprivations; or by deprivation for ever: the sentences are *eiusdem generis*. Here the Bishop has not thought proper to deprive; but he has imposed a reasonable condition, not in *poenam* merely, but with a view to reformation. Is the suspended party to be readmitted at the end of three years without any information to the Bishop? If any is to be required,

(a) 1 *Philim. Ecc. Rep.* 269.

Volume XVIII. the Bishop must have a discretion as to the persons in 1852. whose information he shall place confidence. This

Ex parte Rose.

appears to me quite reasonable; and no authority is stated to the contrary. The doubt intimated in the note to *Watson v. Thorp* (a) is not, in my mind, of any weight. It is true there can be no appeal; but, if a party submits to the course allowed by sects. 3 and 6 of the Act, he knows that he takes his case out of the general rule of procedure.

ERLE J. The only question before us is, whether or not the Court below is exceeding its jurisdiction. I am willing to give Dr. *Rose* credit as to the matters sworn by him respecting the charge itself. But, the report having been made against him, he submitted to the course of proceeding directed by sects. 3 and 6. On a proceeding in ordinary course, a sentence of deprivation might have been pronounced: the only question here is whether a judgment has actually been given "exceeding the sentence which might be pronounced in due course of law": and to that we must answer in the negative.

CROMPTON J. Nothing has been stated to shew that this sentence exceeds the jurisdiction. From the ecclesiastical authorities it is clear that there may be a suspension with conditions: and I think the condition here was reasonable.

Rule refused.

(a) 1 *Philim. Ecc. Rep.* 279, note (a).

*Monday,
June 7th.*

The QUEEN *against* SILL.
See 1 *E. & B.* 553, note (a).

Queen's Bench.
1852.

GOODWIN *against* CREMER.

Tuesday,
June 8th.

ASSUMPSIT. The declaration stated that, before the commencement of this suit, to wit on &c., one *William Webb Ogbourne* made his bill of exchange in writing, and directed it to defendant, and thereby required him to pay to the order of the said *W. W. Ogbourne* 49*l.* 6*s.*, at three months after the date thereof, which period had elapsed, and the said bill had become due, before the commencement of this suit; that defendant accepted the said bill, and the said *W. W. Ogbourne* then indorsed the same to one *William Thorne*, who then indorsed the same to plaintiff; of all which defendant had notice, and then promised plaintiff to pay him the amount of the said bill according to the tenor thereof, and of the said acceptance and indorsement. Breach, non-payment.

Pleas: 1. That defendant did not accept. Issue thereon. 2. That, after the pleading of the last plea, and before this day, &c., and after the said bill of exchange became due, to wit on &c., the said *W. Thorne* in the declaration mentioned paid to plaintiff, then being the holder of the said bill, and entitled to receive the proceeds thereof, and plaintiff accepted and received from the said *W. Thorne*, 60*l.*, the full amount of the said bill and all interest thereon, in full satisfaction and discharge of the said bill, and of all moneys due and payable on account and in respect thereof.

To an action by indorsee of a bill of exchange against acceptor, defendant pleaded that, puis darrein continuance, an indorser had paid to plaintiff, then being holder, and plaintiff accepted, the full amount of the bill, and all interest thereon, in full satisfaction and discharge of the bill and all moneys due in respect thereof (not mentioning damages or costs).

Held, on demurrer, a bad plea.

It would not; for it would allege no satisfaction as regards costs. The plaintiff may be compelled to bring actions against several parties to the bill; and it would be very unjust if payment to him, even of the costs as well as the debt, by one of these parties, were to deprive him of his right to costs from any of the others.

Queen's Bench.
1852.

GOODWIN
v.
CREMER.

Montague Smith, contra. The plea is good. [Coleridge J. I certainly doubt if it can be supported in its present form.] It amounts to a plea of release. If the plaintiff choose to receive the amount of the bill from some person, other than the acceptor, in satisfaction of the bill, that is a release of all causes of action. [Lord Campbell C. J. The plea states that the payment was made, not in satisfaction and discharge of all damages and costs, but only of the bill and all moneys payable in respect thereof.] The plea might probably be amended as to that. In *Beaumont v. Greathead*(a), where the defendant was sued on a joint and several promissory note made by himself and two other persons, it was held that a plea of payment by the defendant was supported by proof of payment by one of those two other parties. [Coleridge J. There the plea stated that the payment was made in discharge of the debt *and damages* in the declaration mentioned.] The declaration there did not mention costs; yet the plea was held to be good by way of bar to the action generally. [Erle J. But the plea alleged payment before action brought; so that the question as to costs did not arise.] It was not necessary to allege, in the present case, that the payment was accepted in discharge of costs. In *Thame v. Boast*(b) it was held that, after the acceptance by the plaintiff of

(a) 2 *Com. B.* 494.

(b) 12 *Q. B.* 808.

Volume XVIII. a sum of money in satisfaction of the debt, he could proceed only for nominal damages, and therefore had no claim in respect of costs.

1852.

GOODWIN
v.
CREMER.

As to the argument that a plaintiff may have to bring actions against the several parties to a bill, the answer is, that, if he chooses to do so, he must run the risk of losing the costs of one action if he succeeds in another; *Bailey v. Haines* (*a*). On the other hand the plaintiff, after a good plea *puis darrein continuance*, may discontinue without payment of costs; *Wollen v. Smith* (*b*).

Lord CAMPBELL C. J. It is unnecessary to consider what our judgment would have been if the plea here had been the same as that in *Jones v. Broadhurst* (*c*) or in *Thame v. Boast* (*d*): this plea differs entirely from the pleas in those actions. This is an action by an indorsee against an acceptor, in which damages might be recoverable beyond the amount of the bill. But the plea does not allege that what the plaintiff received was in satisfaction of damages or costs. It is an experiment which the acceptor tries, upon finding that the indorsee has been called on to pay as well as himself, to stop the action against himself without payment of costs. The holder is entitled to sue the acceptor and all the indorsees in separate actions; and each action must go on till it is brought to its proper termination, or stopped upon payment of costs in that action. The case is very different from that of several parties who have joined in a single contract.

COLERIDGE J. concurred.

(*a*) 15 Q. B. 533.

(*c*) 9 Com. B. 173.

(*b*) 9 A. & E. 505.

(*d*) 12 Q. B. 808.

ERLE J. The plea here pleaded *puis darrein continuance*, in what we may assume to be one of several actions, sets up payment of debt and interest in another action as an answer to this. It is established law, and good sense, that a plaintiff may continue his action till his claim for costs is satisfied: in *assumpsit*, he may sue for a breach of contract where only nominal damages are recoverable. *Beaumont v. Greathead* (*a*) was an action of debt; and it is difficult to say how, after the payment of the debt, an action could lie for the mere non-payment of such debt. If the principal and interest were paid and received, a second action of debt for the same debt could not be sustained. In *Thame v. Boast* (*b*) the plea *puis darrein continuance* shewed satisfaction of the promise, damages and costs; and this was established in proof to the satisfaction of the jury.

*Queen's Bench.
1852.*

**GOODWIN
v.
CREMER.**

(CROMPTON J. was absent.)

Judgment for plaintiff.

(*a*) 2 *Com. B.* 494.

(*b*) 12 *Q. B.* 808.

The QUEEN against The Inhabitants of DENTON. *Thursday,
June 9th.*

A BILL of indictment was found against the above defendants at the *Salford April Sessions*, 1851, for non-repair of a horse and carriage way at the township of *Denton* in the parish of *Manchester*.

By Act of parliament, the liability to repair certain highways in a parish was taken from the parish and

cast upon certain townships in which the highways respectively were; and the Act gave a form of indictment against such townships for non-repair, which would have been insufficient at common law. One of the townships was indicted under the Act, but, before trial, the Act was repealed without any reference to depending prosecutions. The Court

highway &c. so being in decay &c. when and so often as it shall be necessary.

*Queen's Bench.
1852.*

Plea (of January 29th, 1852): Not Guilty.

Stat. 59 G. 3. c. xxii., local and personal, public, the Act above referred to, recited (sect. 1): That the parish of *Manchester* was 52 miles in circumference and contained a population of 140,000 inhabitants, and consisted of 29 townships, two of which were *Denton* and *Haughton*: That the townships (with exceptions not material) had always had surveyors, and none had been appointed for the parish: That, until 1781, the said townships had always repaired their own highways (except turnpike roads and roads repairable ratione tenuræ, and with some other exceptions not material), by a custom which might have been pleaded to an indictment against the parish: That, in 1781 and in subsequent years down to 1809 inclusive, a presentment was made and indictments were found (as the recital more particularly specified) against the parish for not repairing highways situate in certain of the townships; and, the inhabitants of the parish pleading Not Guilty, verdicts and judgments passed against them: That the inhabitants were not then aware that they might allege in defence a custom for the inhabitants of townships to repair all highways generally within such townships: but it had been lately determined (*a*) that a township might be charged, by reason of custom, with the repair of all highways therein, without shewing a custom to repair the particular highway in question. And the clause then, after some further recitals, enacted: "That from and after the passing of this Act no indictment,

The QUEEN
v.
DENTON.

(a) See *Rex v. Ecclesfield*, 1 B. & Ald. 348.

bridleway or footway within any such township, it shall be sufficient to allege generally, that the inhabitants of such township ought to repair and amend such highway, bridleway or footway, without setting forth any custom or prescription for that purpose, or referring to the authority of this Act."

On the trial of this indictment, before *Cresswell* J., at the last Spring Assizes at *Liverpool*, evidence was given to shew that the highway was locally within *Denton*: but it was alleged in defence that *Haughton* was liable to the repair (a); and it was proved that, in fact, the way had, for many years past, been repaired by *Haughton*. On the other side it was contended that, if the way was in *Denton*, liability to repair it could not be fixed on the inhabitants of *Haughton* without shewing some consideration for repair by them: and no evidence of this kind was given. The learned Judge thought that the only question upon which there was evidence for the jury was, whether or not the highway was in *Denton*; and a verdict was found for the Crown; leave being reserved to move that a verdict might be entered for the defendants.

Knowles, in last *Easter* term, moved accordingly, and contended that the fact of repair continued from a distant time was in itself evidence of a consideration. He also moved in arrest of judgment on the following ground.

After the finding of the bill, and before plea pleaded, stat. 14 & 15 Vict. c. x., local and personal, public, was passed (Royal assent, 20th *May*, 1851), "for relief to the several townships in the parish of *Manchester* from the repair of highways not situate within such townships respectively." By that Act, sect. 1, stat. 59 G. 3. c. xxii.

(a) See *Regina v. Haughton*, 1 *E. & B.* 501.

Queen's Bench.
1852.

The QUEEN
v.
DENTON.

bridge (a) and Rex v. Machynlleth (b) shew that, where parties are charged on the record with repairs out of their district, the record must shew a specific consideration ; and, if this is material in point of allegation, it is so in point of proof. If a consideration might be presumed from the mere fact of having repaired, the plea and indictment which were held bad in the two last cited cases would have been sufficient. And it may be asked, if the repair is evidence of a consideration, what consideration does it prove ? [Lord Campbell C. J. What question went to the jury on this point?] None. [Coleridge J. If a consideration had been alleged, would not the usage have been some evidence of it ? In the case of an easement, user is deemed evidence of some grant. Lord Campbell C. J. What actual consideration should you expect for the repair, by one district, of roads in another?] The township charged might receive some especial benefit from the existence of such roads. It might be a matter of bargain. At all events it is for those who lay the charge to account for the liability. [Lord Campbell C. J. The most we could now say is that, if the matter had gone to the jury, they might have thought that the usage arose from a legal liability.] The learned Judge held that the mere repair was no evidence for the jury : nor could it be, because such a fact does not point to any specific consideration.

Assuming the first two counts not to be maintainable, the prosecutors may abandon these and rely upon the third count, which is good, under stat. 59 G. 3. c. xxii., notwithstanding the repeal. Its form is directly sanctioned by the statute : the fact of which it complains was an offence ; and the character of that offence is not

Volume XVIII. altered by the repeal of the A
1852. the repeal but matter of form

The QUEEN
v.
DENTON.

difficult in such a case to distin-
In *Regina v. Mawgan* (a) the
[Lord Campbell C. J. In
A magistrate had presented
tion to present was gone be
be tried; stat. 13 G. 3. c. 78.
5 & 6 W. 4. c. 50. s. 1., this
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Stat. 14 & 15 Vict. c. 10
sects. 4, 5, 8) for simplifyin
by omitting certain details:
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trial? [Lord Campbell C. J.
repealed, the illustration is id
referred to *Surtees v. Elliso*.
Lord Tenterden there, that 1
considered as if it had never
was necessary. And the que
mission under stat. 6 G. 4.
person who had ceased tradin
the older bankrupt laws being
The language of stat. 6 G. 4.

(a) 8 A. & E. 496.

(b) 9 B. & C. 750. *Kay v. Goodwin*

persons "using the trade of merchandize" &c. (not, "having used") should be deemed traders liable to become bankrupt. That required a trading contemporaneous with the Act. [Lord *Campbell* C. J. The principle is that, after the repeal of a statute, what has been done under it is valid, but you cannot any longer make use of that statute. Here, if a judgment had been given under the former Act, it could not be reversed.] In *Hitchcock v. Way* (*a*), where a statute passed altering the law (as to gambling securities) while the action was pending, Lord *Denman* C. J., delivering the judgment of the Court, said: "We are of opinion in general that the law as it existed when the action was commenced must decide the rights of the parties in the suit, unless the Legislature express a clear intention to vary the relation of litigant parties to each other." The same principle was acted upon by the majority of the Court of Exchequer in *Moon v. Durden* (*b*). The maxim recognised in both these cases was "Nova constitutio futuris formam imponere debet, non præteritis" (*c*). [Coleridge J. In *Rex v. McKenzie* (*d*) the indictment was for stealing privately in a shop to the value of five shillings, which, by stat. 10 & 11 W. 3. c. 23. s. 1., was felony without benefit of clergy. After the commission of the felony, and before conviction, that enactment was repealed by stat. 1 G. 4. c. 117., which made the offence punishable by transportation or imprisonment: and the Judges held that sentence could not be passed under either statute.] Here the repealing Act alters nothing but the mode of charging an offence which continues in all respects the same.

(*a*) 6 A. & E. 943.

(*c*) 2 Inst. 292.

(*b*) 2 Erck. 22.

(*d*) Russ. & Ry. 429.

Queen's Bench.
1852.

The QUEEN
v.
DENTON.

COLERIDGE J. The case has been treated as if *Queen's Bench*.
depending merely on the authorities which were cited:

1852.
but, if this were *res integra*, I think we must come to
the conclusion which was arrived at in those instances.
The proceedings are before the Court, and are at a stage
when the question arises whether a particular step can
be justified. It can be justified only by an Act of par-
liament; and that Act is repealed without any saving.
Then, can the Court for the present purpose take notice
of the repealed Act? The answer is that what has been
done and perfected cannot be disturbed; but, if you
want assistance from the statute for a further purpose,
as that of giving judgment, you cannot now have it.
Lord *Tenterden* says, in *Surtees v. Ellison* (*a*): "It has
been long established, that, when an Act of parliament
is repealed, it must be considered (except as to transac-
tions past and closed) as if it had never existed." Nothing
can be more conclusive. In *Rex v. McKenzie* (*b*) all the Judges agreed that sentence could not be passed
under the new Act, which was prospective only. *Wood*
B. and *Park J.* at first doubted whether the prior Act
must not be considered in force for the trial and punish-
ment of offences actually committed before its repeal; a
suggestion like that which has been maintained before
us to-day. But the rest of the Judges differed; and the
two afterwards acceded to their opinion.

The QUEEN
v.
DENTON.

ERLE J. The repealed statute is, with regard to any
further operation, as if it had never existed. It gave a
form of proceeding which has been followed in this

(*a*) 9 *B. & C.* 752.

(*b*) *Russ. & Ry.* 429.

Queen's Bench.
1852.

The QUEEN against SCAIFE and others.

Thursday,
June 10th.

IN this case an indictment for robbery from the person, with violence, had been found at the *Hull* Borough Sessions, and quashed for informality by the Recorder, after the case had been partly tried. Another bill was preferred and found at the next Sessions, removed by certiorari into this Court, and tried at the *York* Spring Assizes, 1851, before *Cresswell* J., at Nisi prius, when a verdict of Guilty was returned. A rule for a new trial was made absolute, in *Trinity* Term, 1851 (a); and the case was sent to *York*, for trial before *Platt* B., at the Summer Assizes, 1851. The learned Judge postponed the trial, at the instance of the prosecutor, till the next Assizes.

At the last Spring Assizes, before *Alderson* B., the prisoners applied to be tried: but the learned Judge, finding that the record was not sealed, refused to try. The prosecutor, without informing the prisoners, applied to *Pollock* C. B., at Chambers, and obtained an order for a writ of procedendo, under which the case was sent back to the *Hull* Quarter Sessions. An application was then made, on behalf of the prisoners, to postpone the trial, on the ground that there had not been time to prepare the defence; but the Recorder refused to postpone; and the prisoners were convicted and sentenced to ten years transportation.

A Judge of any of the three superior common law Courts has jurisdiction to make an order for the issuing of a procedendo, to send back proceedings on an indictment for felony, removed by certiorari from an inferior Court: and it rests in his discretion whether such order should be made upon a summons to shew cause, or immediately.

Dearsley now moved for a rule to shew cause why the

(a) See *Regina v. Scsafe*, 17 Q. B. 238.

Volume XVIII.
1852. procedendo and all subsequent proceedings should be set aside.

The QUEEN
v.
SCAIFE.

First: where any indictment has been removed from an inferior jurisdiction into this Court, and becomes a matter of record here, it cannot, by the common law, be sent back; *4 Inst. 73.* It is true that, in *R v. Wakefield* (*a*), the Court ordered a certiorari to supersede, and the return taken off the file; but the reason assigned was, “*quia improvidè emanavit*.” procedendo cannot be moved for until the certiorari is taken off the file; *Rex v. Clace* (*b*).

Next, although, by stat. 6 H. 8. c. 6., the Judge of this Court, and therefore, since stat. 1 & 2 Vict. c. s. 1., the Judges of the Exchequer and Common Pleas also, have power to send back indictments for felony, that power can be exercised only by the full Court, not by a single Judge at Chambers. Stat. 6 H. 8. gives the power expressly to “the justices of the King’s Bench;” and, where a statute expressly directs proceedings to be taken by the full Court, a single Judge cannot interfere; *Morgan v. Lute* (*c*), *Shaw v. Robert Jones v. Fitzaddams* (*e*), *Geach v. Coppin* (*g*), *Ex parte Owen* (*h*), *Lander v. Gordon* (*i*). [Erle J. I. asks whether stat. 6 H. 8. c. 6. is express upon that point.] Lord Campbell C. J. Could not we now make an order of the Lord Chief Baron a rule of this Court? In that case, it would be taken as granted by the Court.] It would be in the shape of a rule Nisi [Coleridge J. The officers of the Court inform us

(*a*) 1 *Burr.* 485.

(*b*) 4 *Burr.* 2456, 245

(*c*) 1 *Chitty's Rep.* 381.

(*d*) 2 *Dowl. P. C.* 25.

(*e*) 2 *Dowl. P. C.* 111.

(*g*) 3 *Dowl. P. C.* 74.

(*h*) 1 *Dowl. P. C.* 511.

(*i*) 7 *M. & W.* 218.

it is now the common practice for a single Judge of this Court to grant an order for a procedendo, in vacation.

Erle J. I have often done so.]

Queen's Bench.
1852.

The QUEEN
v.
SCAIFE.

Lastly, the writ ought, at all events, to have been granted on a summons to the other side to shew cause; or after service of a rule Nisi, if the prosecutor had applied to the full Court. [Lord *Campbell* C. J. That objection should have been made earlier. *Erle J.* I recollect, in one instance, ordering a procedendo to issue immediately upon the application. Lord *Campbell* C. J. It is in our discretion to grant it at once, if justice make it expedient.] The application here is not too late; the other side has been taken by surprise (a).

Lord CAMPBELL C. J. I am of opinion that no ground for this application has been established. The ground principally suggested is, that a single Judge at Chambers has no power to make an order for a writ of procedendo. But I have no doubt that a single Judge of this Court has power to make such an order, in either term time or vacation; and it is admitted that, under stat. 1 & 2 Vict. c. 45. s. 1., a Judge of either of the other two superior common law Courts has, in general, the same powers as a Judge of this Court. Stat. 6 H. 8. c. 6. does not require the application to be made to the full Court, or in term time; and, where there is no such requirement, a single Judge may always act for the whole Court, subject to his orders being confirmed or set aside by the Court in banc. There can be no doubt that we have authority to make an order of this kind, by a single Judge, a rule of Court. The

(a) There were affidavits as to this.

provision, in stat. 6 H. 8. c. 6., rendering it necessary that the application for such writ should be made to the full Court; the statute seems to make the matter one of ordinary jurisdiction. I think, therefore, that the order here was rightly made.

*Queen's Bench.
1852.*

The QUEEN
v.
SCAIFE.

CROMPTON J. concurred.

Rule refused.

BOSTOCK *against* The NORTH STAFFORDSHIRE
Railway Company.

*Friday,
June 11th.*

ON the trial of this cause, at the *Chester* Summer assizes, 1851, the jury were discharged without giving a verdict. The cause was tried again at the Spring assizes, 1852, and a verdict found for the plaintiff. The Master, in taxing costs, allowed the plaintiff his costs of the first trial, including costs of a special jury. Bramoell on this day obtained a rule nisi for a review of the taxation.

The motion was made on affidavit stating: That, on the first trial, before *Wightman* J., the jury retired to consider of their verdict, and, after remaining some time in consultation, returned into Court and informed the learned Judge that they could not agree upon a verdict; some of them adding that there was not the slightest probability of an agreement: That the Judge thereupon suggested that it would be useless to detain the jury any longer; and that they were accordingly discharged. And "that such discharge of the jury was agreed to on

Where the judge trying a cause discharges the jury because they cannot agree upon their verdict, and a second trial is had, the party who then succeeds is not entitled to costs of the first trial.

And it makes no difference that counsel on both sides, upon conference, assented to the jury being discharged, when the Judge, but for such assent, would have detained them longer.

Judge accordingly discharged the jury, expressly telling them at the same time that the counsel on both sides had consented to their being discharged without giving any verdict : That on the application of plaintiff's counsel, by consent of defendants' counsel, the learned Judge then agreed to certify that this action was a proper one to be tried by a special jury ; which certificate was accordingly indorsed on the Nisi prius record. The deponent further stated "that, as he verily believes and infers from the remarks of the said learned Judge, he the said Judge would not have discharged the said jury without giving a verdict until they had been locked up for a much longer period, unless the parties to the action had consented to their being so discharged." The deponent also denied having heard any suggestion from the Judge that it would be useless to detain the jury, or to that effect, until both parties had expressed a desire that they should be discharged ; he expressed his belief that, until then, no such suggestion was made by the Judge ; and he added that, on the contrary, the learned Judge, after a short conversation, spoke about sending the jury back to consider their verdict further ; when the counsel for the defendants, as before stated, expressed his anxiety that the jury should be discharged, and the Judge answered that he did not at present propose to discharge them.

Queen's Bench.
1852.

BOSTOCK
v.
NORTH
STAFFORD-
SHIRE
Railway
Company.

Welsby, on June 12th, shewed cause. The plaintiff ought to have his costs of the first trial. It has been decided, in *Seely v. Powers* (a) and *Brown v. Clarke* (b), that, where the Judge, of his own authority, discharges the jury, neither party is entitled to costs.

(a) 3 *Dowl. P. C.* 372.

(b) 12 *M. & W.* 25.

Though they waive this, the discharge is still the act of *Queen's Bench.*
the Judge. 1852.

EARL J. It would be very pernicious to hold that, where the jury clearly will not agree, an acquiescence by counsel in their being discharged should affect the costs. If the matter were *res integra*, I do not see why, on principle, the party ultimately succeeding should not have costs where the Judge discharges the jury. But the Courts have held otherwise.

BOSTOCK
v.
NORTH
STAFFORD-
SHIRE
Railway
Company.

CROMPTON J. concurred.

Rule absolute.

The QUEEN against LEGGATT.

*Friday,
June 11th.*

MACAULAY, in last *Easter Term*, obtained a rule calling on *Horatio Bethune Leggatt* to shew cause why a writ of *habeas corpus* should not issue, commanding him to have the body of *Anne Maria Sandilands*, wife of *Alfred John Sandilands*, before this Court. It appeared by the affidavits in support of the rule that *Mrs. Sandilands*, who was not on good terms with her husband, was staying, by her own choice, with her son, *Mr. Leggatt*; and that no coercion had been exercised towards her by him. The application for the writ was made by the husband.

Where a wife is, by her own desire, living apart from her husband, and is under no restraint, the Court will not grant a *habeas corpus* on the application of the husband, for the purpose of restoring her to his custody.

Sir *F. Thesiger* (with whom was *Needham*) now shewed cause. There is no case in which an application

that she cannot be considered to have a will apart from that of her husband, any more than a child of tender years can have a will apart from that of its parent. That point did not arise in *In re Cochrane* (a). In *Rex v. Mead* (b) the Court, no doubt, held that the wife, on being brought up by habeas corpus, had a right to go where she chose, and could not be compelled to return to her husband, at whose instance the writ was issued. But that decision proceeded on the ground that the husband had made a complete renunciation of his marital rights. The affidavit of the wife here, which states that she has no wish to return to her husband, may possibly have been made under coercion. [Lord Campbell C. J. I do not see how this Court can grant a habeas corpus, where the very affidavits upon which the application is founded shew that the wife is under no restraint.] If the husband has a right, as was decided in *In re Cochrane* (a), to exercise a certain amount of coercion over his wife while she is residing with him, in order to make her return to her conjugal duties, it is clear that he is entitled to exercise some amount of coercion to make her return to his roof.

Queen's Bench.
1852.

The QUEEN
v.
LEGGATT.

Lord CAMPBELL C. J. The Court granted this rule with great reluctance, and only because we were strongly pressed, at the time, with a case which appeared to be an authority for our so doing. We have always felt great tenderness in dealing with writs of habeas corpus; but, upon consideration, I think we ought not to have granted this rule. The object of a habeas corpus is to restore to liberty a person who has been unjustly

Queen's Bench.
1852.

BARNES *against* MARSHALL.

Friday,
June 11th.

BOVIDL, in last *Easter* Term, obtained a rule calling on the plaintiff to shew cause why a prohibition should not issue to the judge of the county court held at *Swindon*, in *Wiltshire*, to stay further proceedings in the action in that Court between the plaintiff and the defendant.

It appeared from the affidavits that the plaintiff was a carrier and wharfinger at *Swindon*, and that the defendant lived in *Surrey*. The action was brought for the loading at *Swindon*, and the carriage from *Swindon*, by canal, to *Woolwich* and *London*, of certain timber of the defendant, under the following written agreement :

“*Swindon, May 12th, 1850.*”

Memorandum. I hereby agree to barge Mr. *George Marshall's* oak timber from *Swindon Wharf* to *London*, to any wharf in the river, at 16*s.* per ton of 40 feet, string measure, to include all charges except wharfage, or to *Bristol* at 9*s.* per ton of 40 feet string.

Joseph Barnes.”

In order to crane the timber into the barge, it was necessary to haul it to the wharf from a field on the other side of the canal. When the defendant's horses were not on the spot, the plaintiff provided horses for hauling the timber; and two items in his demand,

one cause of action; that such cause of action was not complete until the timber was delivered in *London*; and that therefore the judge of the county court had not jurisdiction under stat. 9 & 10 Vict. c. 95. s. 60.

Plaintiff, a carrier and wharfinger at *Swindon*, agreed in writing with defendant, living in *Surrey*, to carry his timber by barge to *London*, at 16*s.* per ton, including all charges but wharfage. It was necessary to haul the timber from the place where it lay to the wharf; and plaintiff provided horses for the purpose when defendant's horses were absent. Plaintiff sued in the *Swindon* county court for the balance of his account for the carriage, including a separate charge for hauling.

Held, on motion for a prohibition, that the hauling and the carriage formed

tion Railway Company (a) *Parke* B. said that the carrier was "bound to receive the goods on the money being

Queen's Bench.
1852.

paid or tendered, and the bailor to pay the reasonable amount demanded, on the carrier taking charge of the goods."

BARNES
v.
MARSHALL.

[*Lord Campbell* C. J. The bailor becomes bound to pay, but bound to pay on delivery only.]

The cause of action arises when the contract is made;

Harwood v. Lester (b). At all events the plaintiff here

was entitled to be paid on the spot for the hauling of the timber. That was not a part of his contract as a carrier.

[*Lord Campbell* C. J. Could he recover for the hauling, if he had not completed his contract to carry?] He could; and this is clearly a "material point" in which cause of action arises within the jurisdiction of the county court, according to sect. 128 of stat. 9 & 10

Vict. c. 95.

Bovill, contrà. Sect. 128 gives the superior Courts concurrent jurisdiction "where the cause of action did not arise wholly or in some material point within the jurisdiction" of the county court. But sect. 60, which is the clause expressly declaring in what cases a summons may issue from the county court, provides that it may issue as there stated, when "the cause of action" arose within the jurisdiction. That means the whole cause of action. In *Buckley v. Hann (c)* it was held that "the cause of action," in sect. 40 of the *London Small Debts Act* (10 & 11 *Vict. c. lxxi.*, local and personal, public), meant the whole cause of action. The same construction was given to sect. 60 of stat. 9 & 10 *Vict. c. 95.* in *Wilde v. Sheridan (d)*. In the case *In re Aykroyd (e)* it was held that sect. 63 of the last

(a) 8 *M. & W.* 378. (b) 3 *B. & P.* 617. (c) 5 *Exch.* 43.
(d) 21 *L. J., N. S., Q. B. (Bail Court)* 260. (e) 1 *Exch.* 479.

To support an action for the hauling only, the agreement must have contained a specific contract to pay for such hauling, apart from the charge for carriage.

Queen's Bench.
1852.

BARNES
v.
MARSHALL.

CROMPTON J. As regards the carriage of the timber, it is clear that the plaintiff had no cause of action till the timber was delivered at *London*. It is true that a carrier is not bound to receive goods for carriage until he is paid for such carriage; but he cannot sue for the carriage until it is completed. As to the charge for hauling, the plaintiff could not sue for it in the county court unless there were a separate contract to pay for it, apart from the contract for carriage. Here there is no such contract; and therefore the hauling must be considered, as, indeed the whole course of dealings shews that it was considered by the parties, to be comprised in the contract for carriage, and not to form a distinct "cause of action" within sect. 60.

Rule absolute (a).

(a) See *Re Walsh*, 1 E. & B. 383, and *Re Fuller*, 2 E. & B. 573.

POCOCK against PICKERING and others.

Saturday,
June 12th.

JOSEPH Heathcote Brooks, James Coglan and James Henry Pickering, to secure payment of an annuity, The attestation of a warrant of attorney was as follows:

"Signed, sealed and delivered" &c., "in the presence of me, *H. C.*" (an attorney), "who, at the request and in the presence of the said *J. H. B.*, *J. C.* and *J. H. P.*" (the executing parties), "have set and subscribed my name as the attorney on their behalf attesting the execution hereof, having first read over and explained to them and each of them the nature and contents hereof. *H. C.*"

Held, not a sufficient compliance with stat. 1 & 2 Vict. c. 110. s. 9.

On motion to set aside a Judge's order made at Chambers upon reading certain affidavits, the party moving omitted to bring before this Court the affidavits produced at Chambers; and the rule was therefore discharged with costs. Held, that he might (after payment of costs) renew the same motion, putting in the affidavits.

the affidavits of *James Russell* and of *James Henry Queen's Bench. Pickering* and another. The Lord Chief Baron, when making the order, recommended that the opinion of this Court should be taken as to its propriety.

1852.
Pocock
v.
PICKERING.

In the ensuing *Easter* Term, a rule Nisi was obtained, to set aside the Lord Chief Baron's order. The motion was made on an affidavit of the clerk to the plaintiff's solicitors; but the affidavits of *Russell* and *Pickering*, used at Chambers, were not brought before the Court.

In the same term (*May* 6th) *Bramwell* shewed cause, and contended that, without the affidavits on which the Judge's order was made, the motion could not be entertained; citing *Needham v. Bristow* (*a*). *The Court* (Lord Campbell C. J., *Wightman*, *Erle* and *Crompton* Js.) discharged the rule with costs on this objection.

B. C. Robinson, on the following day, moved again to rescind the Lord Chief Baron's order, on an affidavit by the clerk to the plaintiff's solicitors, verifying copies (which were annexed) of the affidavits at Chambers, but stating that the affidavits were not used there, the Lord Chief Baron deeming it unnecessary to have them read, as the question before him turned wholly upon the form of the attestation. One of the affidavits contained some statements as to the part taken by *Pickering* in the transaction relative to the warrant of attorney; but neither of them stated anything as to the attestation. *Robinson* cited *Regina v. East Lancashire Railway Company* (*b*). The Court granted a rule Nisi, provided that the costs of the previous application were paid.

(a) 4 *Mass. & G.* 262.

(b) 9 *Q. B.* 980.

defendant's attorney, named by him, and attending at his request," was held not to satisfy the second requisition. The authorities upon the subject were reviewed in *Lewis v. Lord Kensington* (*a*), and the general rule of strictness not questioned, though an attestation was there held sufficient which did not in terms comply with the statute: there was, however, substantially a clear fulfilment of the directions. So in *Holt v. Kershaw* (*b*) an attestation was held sufficient in which the party did not literally declare himself to be, or to subscribe as, attorney for the person executing; but the material allegations were in substance distinctly made. [Erle J. I should have thought that, if the whole skill of Westminster Hall had been united to frame a perfect attestation, it would have been like that in *Lewis v. Lord Kensington* (*a*). Yet it passed with great difficulty.] The attestation here is much farther from the terms of the statute. In *Hibbert v. Barton* (*c*) the cognovit purported to be "witnessed by me, W. P., as the attorney of the said W. Barton, attending at the execution hereof at his request, and expressly named by him;" and this was held not sufficient. [Erle J. I was counsel in that case, and never could understand the reason of the decision to this hour.] Consistently with the attestation, the attorney might not have acted for the party executing until the very moment of execution. He might not have read over or explained the document, or had the opportunity of doing so, as attorney for that party. [Erle J. Parke B. says there: "I agree that no precise form of words is rendered necessary for this purpose by the Act; but still those which are used must be

Queen's Bench.
1852.

POCOCK
v.
PICKERING.

(*a*) 2 *Com. B.* 463.

(*b*) 5 *Dowl. & L.* 419.

(*c*) 10 *M. & W.* 678.

ence from the words used that the requisitions of the statute have been complied with.] As to declaring that the party who attests is attorney for the party executing, that is done by the subscription; the words of sect. 9 being "shall subscribe his name as a witness," "and thereby declare himself to be attorney" &c. [Coleridge J. Can that be by the mere subscription? Lord Campbell C. J. It is impossible.] Parke B., in *Elkington v. Holland* (a), was inclined to think that the declaring might be by simply subscribing. [Erle J. That was before *Hibbert v. Barton* (b).] Lewis v. Lord Kensington (c) and other cases shew that, to fulfil the requisitions of sect. 9, a specific form of words is not necessary: it is enough if all the expressions used lead to the conclusion that the subscribing party attends as attorney for the party executing, and subscribes as such. The words here are equivalent to those in *Gay v. Hall* (d). The attestation plainly intimates that, when the warrant of attorney was executed, Clarke was present throughout. [Lord Campbell C. J. He ought to have been so present in the character of attorney for Pickering.] It is not consistent with the words that an attorney for Pickering should have been present at first, but should have walked out, and then another attorney, Clarke, should have come in and attested. Clarke states that he read over and explained the document. [Lord Campbell C. J. That may have been otherwise than as attorney for Pickering.] The same might be said if he had actually declared that he subscribed as Pickering's attorney. He states here that, at the request &c. of Brooks, Coghlan and Pickering,

(a) 9 M. & W. 659.

(b) 10 M. & W. 678.

(c) 2 Com. B. 463.

(d) 5 Dowl. & L. 422.

Queen's Bench.
1852.Pocock
v.
PICKERING.

It is painful to consider such subtleties; but we are bound to give effect to them if we would follow former decisions upon this enactment of the Legislature for the protection of debtors.

*Queen's Bench.
1852.*

POCOCK
v.
PICKERING.

Coleridge J.

COLERIDGE J. The question in this case is, whether the provisions of stat. 1 & 2 Vict. c. 110. s. 9. are satisfied by an attestation to the execution of a warrant of attorney by three persons named therein, which is in the following words. (His Lordship here read the attestation, for which see p. 790, antè.)

The section enacts that "no warrant of attorney to confess judgment in any personal action, or cognovit actionem, given by any person, shall be of any force unless there shall be present some attorney of one of the superior Courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney."

In construing an Act of parliament, our first business, I conceive, is to examine the words themselves which are used; and, if in these there be no ambiguity, it is seldom desirable to go further; and, although from the common uncertainty of language we may very frequently be driven to ascertain the intention by a consideration of the preamble where it recites the object, or of the previous common law where the statute clearly alters or supersedes it, in order to settle the meaning of the enactment itself, yet the object still is only to ascertain

failed in any one of the requisites in fact which the former part requires, it will be in vain to rely on an *attestation faultless on the face of it: if the attestation be deficient, or informal in any particulars on its face, that cannot be cured by its stating, or its being proved, that in fact he fulfilled all the requirements of the former part.*

*Queen's Bench.
1852.*

POCOCK
v.
PICKERING.

Coleridge J.

In the attestation in question, *H. C. Clarke* has subscribed his name as a witness: he has stated that he has so done as the attorney of the parties executing: but he has not beyond this and in express terms declared himself to be their attorney.

There is not, then, a literal compliance with the statute. Is there, then, a virtual one? It appears to me not: and I wish to observe that this is not the same question as whether the attestation shews that the parties have had substantially all the protection and information which they could reasonably desire, or the statute intended. The protection and information which they could reasonably require, and which the statute intends, must be given before execution, and before attestation; and we are now upon a question as to the sufficiency of the attestation; it is not enough that Mr. *Clarke* should have been *de facto* such an attorney, so named, so requested, and so discharging his duty, as the section requires, before execution: he must, beyond this, declare in his attestation on the face of it that he is the attorney of the parties.

Now there can be only two ways in which this attestation can be said to shew a virtual compliance with this requirement: the first, that to state that he subscribed his name as the attorney is the same as to declare himself to be the attorney. But, if that be so, I remark

nature" of the instrument and its contents before execution and attestation, and had "set and subscribed" his "name as the attorney on their behalf attesting the execution" thereof, he yet would not have been their attorney, nor could he truly have declared himself to have been so. In other words, the present attestation may be true in every particular, and yet the requisites of the statute not complied with.

*Queen's Bench.
1852.*

POCOCK
v.
PICKERING.

Coleridge J.

But, lastly, it is obvious on reading the statute that the precisely worded provisions as to the attestation are intended as an additional security, certainly to the debtor, probably to both parties, beyond what is afforded by those which guard the execution. Whether such additional security is thereby gained, or whether it was on the whole wise to seek for it, is immaterial to us, whose only business it is to see that the provisions, such as they are, are complied with.

I conclude, then, that this attestation neither literally nor in substance satisfies the requisites of the statute; and I feel neither regret nor satisfaction in arriving at any such conclusion in this, or in any similar case. In deciding them we ought not to have our minds distracted by looking to the right or left at the particular circumstances, which we very often know but imperfectly after all, and which, if we knew them ever so well, could form no safe rule for the interpretation of the statute, which ought to be general. If there are careless lenders and fraudulent borrowers on the one hand, there may be usurious or over-reaching lenders and oppressed or over-reached borrowers on the other: but in either case the rule must be the same, which the statute lays down, if a Court of law is to apply it with certainty: and, unless applied with certainty, it becomes no rule at all. The

attorney; and, according to my understanding of the words, it declares that he who now as the attorney of the party attests the execution had, before such execution, as the attorney of the party, read over and explained to him the nature of the instrument. Assuming that the statute is to be construed strictly and a literal compliance exacted, according to the judgment in *Hibbert v. Barton* (*a*), this is sufficient.

*Queen's Bench.
1852.*

Pocock
v.
PICKERING.

Erle J.

According to that case the memorandum must allege that the attorney subscribing had acted as attorney to inform the party of the nature of the instrument; it assumes that an attorney may subscribe as attorney in the subscription without having been the attorney to inform of the nature of the instrument: it was an extreme construction, adopted with doubt by Baron *Parke*, and with such repugnance on the part of Lord *Abinger* that he assigned as his reason the then existing feeling in favour of defendants and prisoners: and no one perceived more clearly than himself the mischief which must result from this feeling if it were carried to the extent of generally construing instruments so as to defeat the intention of the parties.

There is no dispute that this attestation, in respect of the witness subscribing his name and stating that he subscribes as the attorney, is correct. But the question has been whether the witness declared by the attestation, according to Lord *Abinger*, that he had been attorney in the actual transaction, and knew what the document was about; according to Baron *Parke*, "that the attesting attorney was present for the purpose of advising the defendant as to the nature and effect of the instrument,

(a) 10 M. & W. 678.

valid form points out the invalidity of the form objected to.

If the words of the enactment are strictly followed, the attestation would be void according to *Hibbert v. Barton* (a). In the words of the statute, the attestation would be "I subscribe my name as a witness to the execution" &c. "and I hereby declare myself to be attorney for the party executing the same, and state that I subscribe as such attorney:" and it would be consistent with this that the subscribing witness became attorney at the time of subscribing without having been attorney before; and according to that decision it is necessary to add that he who subscribes and declares himself to be the attorney had first informed the party of the nature of the instrument that is read over, and explained it to him, which is done here: and, as the subscribing must be not merely by the same man but by the same attorney who gave the information, I cannot suggest a more precise expression than that "I subscribe as the attorney attending on behalf of the party, attesting his execution, having first explained the instrument to him."

I regret that I differ from my Brethren, because this case will be added to the number of those where the creditor instead of receiving *from* is adjudged to pay *to* his debtor, and where the law increases, instead of redressing, the loss from wrong.

Rule discharged, without costs (b).

(a) 10 M. & W. 678.

(b) See *Holford v. Cameron's Coalbrook Steam Coal and Swansea and Loughor Railway Company*, 16 Q. B. 442; and *Edwards v. Cameron's Coalbrook &c. Railway Company*, 6 Exch. 269.

Queen's Bench.
1852.

POCOCK
v.
PICKERING.

Erle J.

sect. 2 is express, that "all writs of execution" may be tested on the day when they are issued, and be made returnable immediately after execution. No other part of the Act restrains the construction. A general enactment may be restricted by a paramount intention apparent in the rest of the statute; but that is not

Queen's Bench.
1852.

Doe dem.
HUDSON
v.
ROE.

issued, signed, and sealed by the signer of the bills of *Middlesex* in the King's Bench, whilst such writs into all other counties and cities have been issued and signed by a different officer, and have been sealed by the sealer of the writs, under and by virtue of an order of the Judges of the said Court: And whereas it is expedient that all writs issued into the county of *Middlesex* from the Court of King's Bench should be signed and sealed by the same persons and in like manner as all other writs issued from the said Courts into other counties and cities; Be it therefore enacted," "That so much of the said Act" "as provides that the writ of summons therein mentioned shall be issued by the officer of the said Courts respectively by whom process serviceable in the county therein mentioned hath been heretofore issued from such Court, shall be and the same is hereby repealed; and that from and after the passing of this Act all writs of summons, distringas, capias, and detainer, issued into the county of *Middlesex* from the Court of King's Bench, shall be signed, sealed, and issued, and the fees thereon shall be taken and accounted for, by the same person or persons and in like manner as all other writs of summons, distringas, capias or detainer issued from the said Court of King's Bench under and by virtue of the said recited Act; any law, custom, or usage to the contrary notwithstanding."

Sect. 2. "And whereas by the existing law, and the practice of the said Courts of common law, actions may be brought and issues proceed to trial and final judgment in vacation, notwithstanding the cause of action may have arisen subsequent to the then preceding term, and jury process of writs of execution are now by law tested in term time only; be it therefore enacted, that from and after the passing of this Act the writ of *venire facias juratores* may be tested on the day on which the same shall be issued, and be made returnable forthwith, and that the writ of *distringas juratores* or *habeas corpora juratorum* may be tested in term or vacation on a day subsequent to the teste of the writ *venire facias juratores*, and that all writs of execution may be tested on the day which the same are issued, and be made returnable immediately after execution thereof: Provided always, that when any trial is to be had at bar, the writ of *venire facias juratores* shall be made returnable as heretofore."

ejectment, a *f. fa.* should be returnable immediately, if for costs only, but not so if an *habere facias possessionem* were added.]

Queen's Bench.
1852.

Doe dem.
HUDSON
v.
ROZ.

Petersdorff, contrà. The practice as to issuing writs of *habere facias possessionem* is regulated by stat. 11 G. 4 & 1 W. 4. c. 70. s. 38. Sect. 2 of stat. 3 & 4 W. 4. c. 67. is part of a body of enactments as to process, fulfilling, among other objects, that of empowering the Judges to give speedy execution in personal actions. That it does not apply to ejectments is clear from the introductory recital of that section, that, by the existing law and practice, actions may be brought and tried in vacation though the cause of action may have arisen after the preceding term. That is the reason of the enactment; and it applies to personal actions, but not to ejectment, which could not have been brought in vacation, except after issuable terms under the provisions of stat. 11 G. 4 & 1 W. 4. c. 70. s. 36. [Lord *Campbell* C. J. Still the enacting part of the clause might extend to actions of ejectment. *Coleridge* J. There were, when the clause was framed, some actions of ejectment which might be brought in vacation.] The Legislature probably contemplated only those which ordinarily might be so brought. The title of stat. 3 & 4 W. 4. c. 67., which mentions personal actions only, is not immaterial. [Lord *Campbell* C. J. Notice is taken of the title where the enactment is doubtful. I remember that was so in *Dr. Free's* case (a).] The recital of sect. 1 must be looked to in construing sect. 2; and in that recital it is evident

(a) *Free v. Burgoyne*, 5 B. & C. 400. S. C. in Dom. Proc., 2 *Bligh*, N. S. 65.

"An Act to amend an Act" &c. "for the uniformity of process in personal actions." But under such a title there may well be a clause introduced to embrace process in ejectment. The preamble to sect. 2 contains nothing which excludes ejectment from the enacting part. And convenience, as it seems to me, requires that ejectment as well as other forms of action should be included, and not that, in the same action, there should be process of execution for costs returnable immediately, and an habere facias possessionem not so returnable. We are informed that in recent practice it has been usual to make the *fi. fa.* for costs in ejectment returnable immediately; and the habere facias possessionem ought to be so too.

Queen's Bench.
1852.

Doe dem.
HUDSON
v.
ROE.

COLERIDGE J. If the enacting clause were such that inconveniences and legal inconsistencies would result from giving it the plain construction, limited words in the preamble might be looked to as a ground for construing the enactment differently. But the mere circumstance that general words are preceded by a limited preamble is not of itself a reason for giving a limited construction to those words. Sometimes a general preamble is followed by a limited enactment, sometimes a limited preamble by a general enactment, as here. No necessary conclusion results in either case. The argument as to purchases of land is answered by the suggestion of my brother *Erle*, that the purchaser may look for the judgment.

ERLE J. The enactment that "all writs of execution" may be made returnable immediately seems conclusive,

Queen's Bench.
1852.

TRINITY VACATION.

IN THE EXCHEQUER CHAMBER.

Monday,
June 14th.

(Error from the Queen's Bench.)

TETLEY *against* TAYLOR.

Reported, 1 *E. & B.* 521. 532.

BOSTOCK *against* SIDEBOTTOM.

[*Friday,*
April 30th.]

TRESPASS for breaking and entering plaintiff's Lands, partly adjoining a river, were demised for 999 years, by indenture, in which the

lessor granted to the lessee liberty to cut a goit or sluice out of the said river, at a proper and convenient distance above a certain weir, in the most convenient line through certain closes (named) of the lessor, into a close, intended for a mill dam, part of the demised lands; and from time to time and at any time to turn the water of the river through the said goit: And liberty, from time to time, and at all times during the term, to view, examine, carry and lay down materials, and repair and amend the said goit or sluice (and other works specified), when so made as aforesaid, or any of them, when and as often as need or occasion should be, making reasonable satisfaction to the lessor, his heirs and assigns, for all damage to be done or occasioned thereby to the grass or herbage of the lessor, &c. : And the lessee covenanted that he, his executors, &c., would make reasonable satisfaction to the lessor, his heirs and assigns, for all damages to be occasioned to the lands of the lessor by the lessee, his executors, &c., in exercise of any of the liberties, privileges and powers by the indenture granted, except for the term of two years next ensuing the commencement of the rent, during which time no trespass or damage should be charged or paid for.

In an action of trespass against the lessee for widening a goit on the lessor's soil to the extent of nine additional feet, the defendant pleaded that the goit was made, viz. on &c. (a day named), in due exercise of the liberty above mentioned, but that, the same not having been made of a sufficient width, and completed to a small and insufficient width only, viz. nine feet, so that, without widening it as after mentioned, defendant could not enjoy the demised tenements as he was entitled by the indenture to do, he, on &c., in further due exercise &c., cut down the

the said demised piece of land parcel of *Higher Croft* Queen's Bench.
and *Lower Croft*) of the watercourse or bed of a river 1852.
called the *Mersey*: And also full and free liberty &c.
to make, build, erect and fix a weir or dam in, through
and across the said river anywhere opposite to and
adjoining to the said *Em Meadow*, but not so as to
injure a certain county bridge &c., or to hinder the
water from flowing down the tail goit of a certain mill
situate &c., belonging to one *John Marsland*, on the
level on which it then flowed: "Also full and free
liberty, privilege, power or authority to cut a goit or
sluice out of the said river at a proper and convenient
distance from and above the said weir in the said most
convenient line or direction through the said close
called the *Em Meadow*, and the said other close of the
said *J. Bostock* deceased called *The Lime Field*, into
the south westerly side or end of the said plot, piece or
parcel of land," in the indenture described as intended
for a reservoir: "and also to make, erect, build and fix a
fender or shuttle at the mouth of such goit or sluice,
and also to make, erect, build and fix a bye wash or
waste gate at or by the side of such goit or sluice in any
part of the same close called *The Em Meadow*, and
cut a drain from such bye wash or waste gate into the
said river; and from time to time and at any time to
turn and divert the water of the said river into and
through the said fender and goit or sluice, and also
into and through the said bye wash or waste gate and
drain, or any of them:" Also full and free liberty &c.
to make and from time to time repair a drain from
a certain other close of *J. B.* called *The Bank* to and
into the said piece of ground parcel of *Higher Croft* and
Lower Croft, and to turn half the water of a certain

BOSTOCK
v.
SIDEBOTTOM.

Volume XVIII. spring rising in the said close called *The Bank* into and
1852. through the said drain for the use of the last mentioned

BOSTOCK

v.

SIDEBOTTOM.

piece of land &c.: "And full and free liberty" &c.,
"from time to time, and at all times during the term
by the said indenture granted, to view, examine, carry
and lay down materials, and repair and amend the said
weir or dam, and also the said goit or sluice, fender or
shuttle, bye wash or waste gate and drains, when so
made as aforesaid, or any of them, when and as often
as need or occasion should be and require, making
reasonable satisfaction to the said *J. B.* deceased, and
his heirs and assigns, for all damage to be done or occa-
sioned thereby to the grass or herbage" of the said *J. B.*,
his heirs or assigns, as thereinafter particularly mentioned.
Habendum to *W.* and *G. Sidebottom*, their executors,
administrators and assigns, for a term not yet ended,
viz. 999 years from the date of the indenture, yielding
&c. the yearly rent of 84*l.*, payable half-yearly; the
first payment on 12th November, 1801. And *W.* and
G. Sidebottom, the lessees, covenanted to *J. B.*, his
heirs and assigns, that they, the lessees, their execu-
tors, administrators and assigns, should and would make
reasonable satisfaction to *J. B.*, his heirs and assigns,
for all damages to be done or occasioned to the lands
of *J. B.* at or near *Broadbottom* aforesaid by the lessees,
their executors &c., from time to time, in exercise of all
or any of the liberties, privileges and powers by the said
indenture granted, "save and except for the term of two
years from and next ensuing the commencement of the
said rent, during which time no trespass or damage
should be charged or paid for." And also that *W. Side-
bottom* and *G. Sidebottom*, their executors, administrators
or assigns, should and would, within four years from the

date of the indenture, at their own proper costs, erect, *Queen's Bench.*
build, &c., or cause and procure to be erected, built, &c., *1852.*
on the demised piece of land parcel of *Higher Croft* and
Lower Croft, one or more good and substantial building
or buildings, and keep the same in tenantable repair so
as to be always of the clear yearly rent of 170*l.* at the
least; and that such building or buildings should always
consist of good brick or stone, oak or fir timber, and
covered with slate. "And also that they, the said
W. S. and *G. S.*, their executors, administrators and
assigns, should and would arch or otherwise cover over
the said goit or sluice so to be cut and made through
the said *Em Meadow* and *Lime Field* as aforesaid, save
and except for the distance of twelve yards in length
next adjoining the said intended bye wash or waste
gate, with good stone or brick, and afterwards cover the
same again with soil so as to make the same into good
arable or mowing land or ground, and should and would,
from time to time, and at all times thereafter during
the said term by the said indenture granted, keep and
continue the said goit or sluice so covered with soil
in a good and workmanlike manner." As by the said
indenture &c.

The plea then stated that the lessees, viz. on 12th
July, 1800, entered and were jointly possessed &c., and
entitled to the said liberties, privileges, &c., for the
said term; and that, they being so possessed &c., after-
wards, and during the said term, in pursuance of the
indenture, and within the time thereby required, viz.
on &c., divers buildings were erected and built on the
land parcel of *Higher* and *Lower Croft* as required by
the indenture: that one lessee died, and the survivor,
by his will, bequeathed the residue of the term to a

BOSTOCK
v.
SIDEBOTTOM.

for a reservoir as aforesaid, but the said sluice, goit or watercourse not having been and not being, at the said times when &c., or any of them, cut or made to or of a sufficient width, and the same having been and being then completed and cut and made to and of a certain small width only, viz. the width of nine feet, and such width being a wholly insufficient width in that behalf, so that without widening the said sluice, goit," &c., "to the extent hereinafter mentioned, and keeping and continuing the same so widened, the said defendant could not have or enjoy the use and benefit of the said demised tene- ments with the appurtenances, and of the said water of the said river *Mersey*, in so free and ample a manner as he otherwise might and could and then ought and was entitled to have and enjoy, and still might and is entitled to have" &c., "under and by virtue of and according to" the said indenture, and "defendant being then able and ready and willing, upon the said sluice, goit," &c., "being so widened as aforesaid, to cover over the same, save and except as in the said indenture in that behalf is excepted, with good stone or brick, and afterwards cover the same again with soil so as to make the same into good arable or mowing land or ground, and to keep and continue the same so covered," &c., "he, the said defendant, at the said times when &c., for the purpose of so widening and amending the said goit as aforesaid, and in the further due exercise of the said liberties, privileges and powers by the said indenture granted, did enter the said close of the plaintiff called *The Em Meadow*, and did then, for the purpose aforesaid, cut down the sides of the said sluice, goit," &c., "there, and did then widen the said sluice, goit," &c., "from the said then insufficient width of the same as aforesaid to a certain

Queen's Bench.
1852.
BOSTOCK
v.
SIDEBOTTOM.

the said indenture and in the said plea in that behalf mentioned, the said goit being the same goit, sluice or watercourse in the declaration and in the said plea in that behalf mentioned; and which said goit, when so cut, made and completed as aforesaid, was of a certain width, to wit the width in the said plea in that behalf mentioned; and then arched and covered over the said goit according to their covenant in that behalf in the said indenture contained: And the plaintiff further saith that, the said goit being so then cut, made and completed as aforesaid, and being so then arched and covered over as aforesaid, and then being of the width aforesaid, remained and continued so arched and covered over as aforesaid and of the width aforesaid during all the time next hereinafter mentioned, and in that state and condition was used and enjoyed by the several persons from time to time possessed of the said demised tenements with the appurtenances and entitled to the said liberties, privileges and powers so therewith granted as aforesaid, from the said 1st day of *August*, A.D. 1800, continually until the defendant on the said 20th day of *December*, A.D. 1850, he then being so possessed and entitled as last aforesaid, under colour of the said indenture, and in pretended further exercise of the said liberties, privileges and powers thereby granted, broke and entered the said close," &c., and then cut down the sides of the said sluice, goit &c., and widened the same, and kept and continued the same &c., in manner and form &c. Verification.

Demurrer, assigning causes which will appear sufficiently by the argument. Joinder.

Maynard, for the defendant. The replication is no

Queen's Bench.
1852.

BOSTOCK
v.
SIDEBOTTOM.

but to remake.] If the original lessees had not completed the goit to the full length, their assigns might have come in and finished it. [Lord *Campbell* C. J. In the case you put, it would not have been made in the first instance.]

Queen's Bench.
1852.

Where powers of this kind have been given by Act of parliament, which fixes no period for completing the proposed work, it has been held that a Court of law cannot limit the time at which the work may be resumed after having been suspended; *Thickness v. The Lancaster Canal Company* (a). Lord *Abinger* said there: "I do not say that a Court of equity might not interfere in such a case, but a Court of law cannot. A Court of law must construe this Act now as if it were the day after the Act passed." That, in principle, applies here. [Lord *Campbell* C. J. There the Act was for making a canal from *Kirkby Kendal* to *West Houghton*, and a canal had never been made from one of those points to the other: the canal therefore was not complete. You have made a complete goit, so as to take the water from the river and bring it back again. *Erle* J. You put the case as if an experimental goit might be made in the first instance, and, after experiment, an alteration introduced.] In *Dand v. Kingscote* (b) coal mines were reserved by a deed executed in 1630 "with sufficient wayleave" to and from the mines, and liberty of sinking pits for winning of coal &c.; and it was held that under this reservation the defendant might lay down railways for the more convenient getting of the coal, though such ways were not in use at the date of the deed. [Lord *Campbell* C. J. The terms of reservation there gave power to make all manner of ways. *Erle* J. A power of the description of a "wayleave," appurtenant to a mine, would be adapted

Bostock
v.
Sidebottom.

(a) 4 M. & W. 472.

(b) 6 M. & W. 174.

as first made, might be an experiment, is inconsistent with the dates of the making and widening, as shewn by the replication. [Lord *Campbell* C. J. The time is not alleged so as to be material.] At all events, if the goit was once made of a width which appeared sufficient at the time, and was used, the lessee could not afterwards come in and widen it: his power was gone. The user shewed that the goit had been finished as was intended, and that the lessee was satisfied. The rule of law is that "every grant shall be expounded as the intent was at the time of the grant;" *Mildmay v. Standish* (*a*). Here nothing shews an intention at that time, justifying the claim of the defendant. The deed does not contain any covenant by the lessee to build mills, or to do anything by which the goit would become a benefit to the reversion. The lessee is bound to build certain houses; and he has simply liberty to make a goit. Suppose a goit had been made in which a wheel of fifty horse power could be worked, and the lessee afterwards, in consequence of increasing business, required a wheel of twice the power; could he at any time enlarge the goit in proportion? The power granted is to make "a" goit; and the individual goit, when made, is to be covered in as the deed directs: and that has been done. The liberty to "repair and amend" from time to time, supposing it incident to the grant, does not assist the defendant. "Repair" and "amend" are synonymous. The tenant amends by repairing. And the words "to view, examine, carry and lay down materials," which accompany the provision for repairing and amending, shew that nothing more than a repair in the ordinary sense was meant. [Lord *Campbell* C. J. Mr. *Maynard*

1852.
BOSTOCK
v.
SIDEBOTTOM.

(a) *Cro. Eliz.* 34. 35.

Lord CAMPBELL C. J. The plaintiff is entitled to our judgment. The licence given by the deed is to make a goit, and to make it once: when it has been once made and completed, there is no power to make another. It is not as where liberty is given to do a thing toties quoties, as to make roads: the lessees are to make "a" goit: and the replication shews that that power has been once exercised and is exhausted. The count, in trespass quare clausum fregit, is answered by a plea in which the defendant relies upon his power to make a goit: the replication states that the lessees, before the several times when &c., "under and by virtue of the said indenture and in the due exercise of the said liberties, privileges and powers, cut, made and completed a certain goit out of the said river *Mersey* in the said indenture and in the said plea mentioned, and at such distance from and above the said weir in the said indenture and in the said plea mentioned, and in such direction, as in the said indenture mentioned and required, and through the said closes in the said indenture and in the said plea in that behalf mentioned." That is, in effect, an allegation that the power has been exercised once, and is gone. The power to repair and amend was not power to make another goit; and the goit, as described by the pleadings, was another. If Mr. *Maynard* could have shewn, as he did almost contend, and must, I think, have shewn in order to succeed, that the indenture gave a power to be exercised from time to time in any direction during the nine hundred and ninety nine years, the case might have been different: it might then have been that the goit might have been varied in width as well as in direction: but the licence, as set out, is "to cut a goit or sluice out of the said river at a proper and

Queen's Bench.
1852.

BOSTOCK
v.
SINDBOTTOM.

ERLE J. The power of making a goit was to be exercised once for all; the power to repair and amend might be acted upon from time to time; but I think this last privilege did not include the right of constructing a goit of a different width. The clause as to compensation after two years, in my opinion, shews the intention of the parties. When the grantees were at the expense of making new works, they were to have the liberty of doing so without rendering compensation; but, after the works were once completed, then, if damage was done by coming in to repair, satisfaction was to be made.

*Queen's Bench.
1852.*

BOSTOCK
v.
SIDEBOTTOM.

CROMPTON J. concurred.

Judgment for plaintiff.

IN THE EXCHEQUER CHAMBER.

*Monday,
June 14th.*

(Error from the Queen's Bench.)

SIDEBOTTOM *against* BOSTOCK.

THE defendant in the preceding case brought Error on the judgment of the Court of Queen's Bench. The plaintiff below joined in Error. The case was now argued in the Exchequer Chamber.

For marginal
note, see
p. 813, ante.

Collier, for the plaintiff in error (defendant below). The plaintiff below admits by his replication that the goit, as originally constructed, was insufficient. He ought to have traversed this allegation in the plea, or at any rate to have new assigned. The averments as to time are

and the work is performed accordingly. Had it been *Queen's Bench.*
intended that this might be done over and over again,
provision should have been made for the purpose.

SIDEBOTTOM
v.
BOSTOCK.

CRESSWELL and TALFOURD Js. concurred.

PARKE B. The plaintiff in error is endeavouring to impose upon the land of the grantee a servitude much more onerous than that which the grant concedes. To allow a man to construct a goit over your land is a very different thing from allowing him to do so from time to time.

ALDERSON and PLATT Bs. concurred.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

Tuesday,
June 15th.

(Error from the Queen's Bench.)

OSTLER *against* COOKE and others.

AFTER the decision of the Court of Queen's Bench in this case (*Ostler v. Cooke*, 13 Q. B. 143), the A local drain-
age Act created
the lords or
ladies of three
manors, or, in
his, her or their absence, their agents appointed in writing under their hands, commissioners for executing the Act; it authorized the commissioners to take lands for the purposes of the drainage; and it contained clauses for that purpose to the same effect as those in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18.), subsequently passed: And it provided that no person should be capable of acting as a commissioner or agent for a commissioner till he had made a declaration that he would duly execute the powers in the exercise of which he should act as commissioner or agent.

The three lords of the manors, by writing under their hands respectively, appointed the defendants their agents; but without having first made the declaration. The defendants

The writ of error was now argued, before *Maule, Queen's Bench.
Cresswell, Williams and Talfourd* Js., and *Parke, Alder-
son and Platt* Bs. 1852.

OSTLER
v.
COOK.

Sir *F. Thesiger*, Attorney General, for the plaintiff. First, the defendants had no title to act as commissioners; and this defect vitiates the whole of the proceedings. Sect. 1 of stat. 6 & 7 Vict. c. lxxvi. enacts that, for the purposes there pointed out, certain individuals shall be, and they are thereby appointed, commissioners. Power is given to them to nominate agents; but they cannot withdraw themselves from being commissioners: they must, in the commencement, take up that character. Here the commissioners never made the declaration prescribed by sect. 2 (a), nor have they done any official act except that of nominating agents. But to do that act itself they ought to have clothed themselves with authority by making the declaration, which, as set out in schedule (B.), promises due execution of "all the powers and authorities in the execution whereof" the party "shall at any time act as a commissioner." It may not be necessary that the agent should

(a) Stat. 6 & 7 Vict. c. lxxvi. s. 32. enacts that, in any action against the commissioners, or any of the persons acting in the execution of this Act, for any matter or thing arising out of the Act, the qualification of the commissioners, and the appointment of clerks, treasurers, collectors, superintendents, or other persons appointed by the commissioners under the authority of this Act, shall, upon the trial of such action, stand admitted in evidence, unless the party against whom it would be evidence shall have given notice, at the time and in the manner pointed out by this section, that he intends to dispute such qualification or appointment. The special verdict stated "that, the said plaintiff not having given the notice required by sect. 32 of the said Act, a Judge's order was made by consent that the plaintiff should be held not to have admitted the qualification of the commissioners, but should be allowed to dispute the same except as to the declaration and oath taken by the defendants."

objection: it merely prevents the annulling of acts done at a lawful meeting of commissioners if an unauthorized person happens to have been present. [Alderson B. The person himself is punishable under sect. 3. Parke B. The intention probably was to punish the unauthorized individual without invalidating the act.] That is so. There could be no act of a meeting at all unless more than one qualified person were present: but, where that is the case, the act is not to be invalidated because an unqualified person attended. The argument here, which sect. 4 does not meet, is, that if the principal has not power to act he has not power to make a deputy.

*Queen's Bench.
1852.*

OSTLER
v.
COOK.

Secondly, the agents here ought to have shewn in their proceedings for what commissioners they respectively acted. That does not appear; but the defendants act in their own names as commissioners. This is material, if the distinction pointed out, between the commissioners and their agents, be correct.

Thirdly, the proceedings are defective in not specifying the parcels of land which are to pass. This is evidently necessary where the lands to be taken are part of a larger quantity. The notice to treat, here, does describe the parcels; but the warrant, which is the sheriff's authority to summon a jury, neither specifies the parcels sufficiently nor refers to the notice. The inquisition refers to nothing but the warrant, and does not denote the parcels, further than by that reference. Yet, by sect. 87(a), the inquisition is the judgment which is to be recorded and filed with the clerk of the peace, and to be the evidence of the transaction. [Maule J. The

(a) 13 Q. B. p. 166.

issued to the sheriff, under sect. 73(a). [Maule J. If Queen's Bench.
the land is vested in the commissioners by payment 1852.
into the Bank under sect. 63, they do not require a
precept for the purposes of this action.]

OSTLER
v.
COOK.

Bramwell, contrà, was stopped by the Court.

PARKE B. We are all of opinion that the judgment of the Court of Queen's Bench is right.

The first question is whether the defendants are entitled to defend as "commissioners." It is true that the first section of the Act appears somewhat inartificial, especially when its clauses are coupled with the Schedules. But we are of opinion that, substantially, the Act constitutes the lords or ladies of the manors commissioners, and that, if they do not choose to act, but absent themselves, they may appoint their agents, who then are commissioners. Sect. 1 expressly enacts that the lords or ladies of the three manors, or their agents appointed in writing under their hands, and which respective appointments may be in the form given by Schedule (A.), "shall be and are hereby appointed commissioners for executing this Act." Looking at the situation in life of the persons first mentioned, it might be supposed that they probably would not act in person. The form in the Schedule is, indeed, not very well adapted to the contemplated state of things; but the use of it is not obligatory; the form is to be that, or as near thereto as circumstances will admit. And the enactments of the statute, not the Schedule, must be looked to. The effect of those enactments is,

(a) See 13 Q. B. 164.

The following clauses of stat. 6 & 7 Vict. c. lxxvi.,
not set out in the report of *Ostler v. Cook*, 13 Q. B.
143, 163 et seq., but cited before the Court of Error,
may conveniently be added here.

Queen's Bench.
1852.

OSTLER
v.
COOK.

Sect. 1. enacts as follows : " Whereas certain fen lands and low grounds in the several parishes, hamlets, townships, or places of " &c. " containing in the whole 2720 acres or thereabouts, (that is to say)" &c., " or some portions of the said fen lands and low grounds, have been for many years past and still are liable to inundation, and are thereby injured and rendered to a great degree unprofitable to the owners and occupiers thereof respectively : And whereas the said fen lands and low grounds would be greatly improved, and rendered of much greater value to the owners and occupiers thereof, if the same were effectually drained and embanked ;" it is therefore enacted : " That from and immediately after the passing of this Act the lords or ladies of the several and respective manors of *Bardsey*, *Typholme*, and *Stixwood* aforesaid for the time being, (or, in his, her, or their absence, their respective agents, appointed by writing under his, her, or their respective hands, for each of the said manors respectively,) and which respective appointments may be made according to the form specified in Schedule (A.) to this Act" (13 Q. B. 145.), " or as near thereto as circumstances will admit, shall be and are hereby appointed commissioners for executing this Act : Provided nevertheless, that no person shall be capable of acting as agent for more than one commissioner at one time."

Sect. 2. enacts : " That no person shall be capable of acting as a commissioner or as an agent of a commissioner until he shall have made and subscribed a declaration in the words or to the effect set forth in the Schedule (B.) to this Act" (13 Q. B. 145.).

Sect. 3. enacts : " That in case any commissioner shall act before he shall have made the said declaration, or if any person, not being duly qualified, shall act, or shall appoint an agent or deputy who shall act in the execution of this Act, every such person shall forfeit and pay for every such offence the sum of 50*l.* ;" " and the person so prosecuted shall prove that he hath made such declaration, and is qualified as aforesaid, without any other evidence on the part of the prosecutor or plaintiff than that such person hath acted as a commissioner in the execution of this Act, or hath appointed an agent who hath acted in the execution of this Act."

Sect. 4. enacts : " That no act or proceeding of the commissioners shall be impeached or rendered or deemed to be informal by reason of any person not duly authorized to act as a commissioner in the execution of this Act having acted or concurred therein."

Sect. 10. enacts : " That the property of and in the several mills or engines, sluices, tunnels, bridges, culverts, catchwaters, locks, quays, banks,

Queen's Bench.
1852.

The QUEEN *against* The Inhabitants of the
County of SOUTHAMPTON. (Black Bridge.) *Friday,*
June 18th.

The QUEEN *against* The Same. (Sandown
Bridge.)

The QUEEN *against* The Same. (Tinker's
Bridge.)

THESE were indictments for the non-repair of three public bridges, respectively, in the *Isle of Wight*,

The Isle of Wight is a division of the county of Southampton,

but has no separate commission of the peace. Before 1842, all public bridges in the island, not repairable by tenure, were repaired either by the tithings, parishes or townships in which they were situate, or from rates levied on all the parishes in the island, under the following circumstances. The island having been assessed to the general county rate, and appeals against such assessment having been entered, an arrangement was made, in 1774, by consent, under an order of Quarter Sessions, fixing certain proportions to be paid by the parishes in the island towards the general county rate, but leaving the expense of bridges and the house of correction in the island to be raised by a local rate; the island being adjudged and declared not to be liable to pay to the county bridge rate or county house of correction; and the inhabitants agreeing to erect and maintain houses of correction and bridges within the island at their own sole expense. After this arrangement, the practice was for the county Quarter Sessions, on the application of the justices for the *Isle of Wight* division, to lay a rate, in the nature of a county rate, on every parish in the island, for the repair of the island bridges and bridewell. Till 1842, there had been no instance of the general county rate being applied to the repair of the island bridges. In 1813 stat. 53 G. 3. c. xcii. appointed commissioners for the repair of the highways in the island, with power to make assessments, and enacted that all bridges previously repaired by any parishes, tithings, divisions or townships in the island should, for the future, be repaired "in such and the same manner, and by such and the same ways and means," "as other bridges" "usually called county bridges" within the island had been accustomed to be repaired. In 1842, and since, the island was assessed generally with the county, and no separate island rate made. Application for the repair of bridges and bridewells in the island had been, since that time, made to the county Quarter Sessions.

Held, that all bridges which, at the time of the passing of the Act, were repairable by the tithings &c. in which they were situate, were for the future repairable by the county generally; and that the arrangement of 1774 did not affect the legal liability of the county, and was no answer to an indictment against it for non-repair of such bridges.

A bridge in the island, originally repaired by the tithing, was, after the passing of the Act, wholly rebuilt by order of the justices for the island division. The new bridge was larger than the old, and different in form, and stood higher up the stream. The expense of the

Bridewell in the island, and for other purposes to which such rate was by law applicable within the island. Before 1774 entries in the order books and books of assessment of the general county rate shew that rates were at various times made on the several places and parishes in the *Isle of Wight*; but the sums levied thereon were not uniform. (The case then set out all the entries found in the existing county records, down to 1774, which related to the practice upon the point in question.) These contributions were part of the general county rates, and applied indiscriminately with the contributions of the main land. No instance is known, before 1842, of the application of the general county rate to the repair of an island bridge; but the county justices of the *Isle of Wight* division were used to expend the island rate in the nature of a county rate, made in the manner above specified, on the objects for which it had been directed to be applied by the county quarter sessions, i. e. "island bridges and Bridewell;" and this was the usage and practice when the local Act above referred to passed. Until very recently there has always been a house of correction or Bridewell for the *Isle of Wight* in *Newport*. There is not, nor ever was, a commission of the peace for the island, which is a division of the county of *Southampton*.

In 1772, the *Isle of Wight* having been assessed to the general county rate in common with the other parts of the county, appeals against such assessment were entered, which were continued to 1774, when arrangement was made, by consent, at the general quarter sessions, fixing certain proportions to be paid by the parishes in the *Isle of Wight* towards the general county rate, but leaving other items of expenditure, viz. bridges

Queen's Bench.
1852.

The QUEEN
v.
Inhabitants of
SOUTHAMP-
TON.

for consolidating the management of all roads and highways in the *Isle of Wight*, and appointing commissioners for that purpose.

*Queen's Bench.
1852.*

The QUEEN
v.
Inhabitants of
SOUTHAMP-
TON.

Sect. 67 enacts as follows: "That all bridges, drains, and sewers within the said parishes, and places aforesaid, which have, previous to the passing of this Act, been accustomed to be repaired by any parishes, tithings, divisions, or townships, within the said island, shall from and after the 11th day of *October*, 1813, be for ever repaired and kept in repair in such and the same manner, and by such and the same ways and means, as other bridges, drains, and sewers, usually called county bridges, within the said island, have been and are accustomed to be repaired; and that, from and after the said 11th day of *October* such particular parishes, tithings, divisions, and townships, shall be discharged from the exclusive burden of keeping and maintaining such bridges, drains, and sewers in repair."

Sect. 81 enables the commissioners to build, erect, repair, and keep in repair any bridge or bridges, arch or arches, upon any part or parts of the roads in the island, and across any river, stream, ditches, or drains therein or contiguous thereto, making recompence to the owners or occupiers of lands for damage done to them. Sects. 53, 55, 62, empower the commissioners to assess the inhabitants for the repairs of the highways.

In 1838, 1839 and 1840 the justices of the *Isle of Wight* division repaired *Black Bridge* out of the island rate so made by order of Quarter Sessions as aforesaid. In 1840 it was wholly rebuilt by them out of the island rate, with stone, with one arch. The old bridge was narrower by three or four feet, and consisted of stone walls at each end, with oak timber trees placed from one wall to the other across the stream. Across the trees

rate has been made at the Quarter Sessions: but applications have been made, from time to time, to the justices of the general Quarter Sessions at *Winchester*, to repair bridges and bridewells in the *Isle of Wight* when the repairs became necessary.

In *January*, 1847, *Black Bridge* was repaired by the county magistrates, when the sum expended was *2l. 15s.*; and a like repair has been once made by the same magistrates, but, on this last occasion, without prejudice to the question of liability. The commissioners of highways under the above mentioned local Act have repaired the road over the bridge, and for one hundred yards on either side thereof, since the passing of the local Act down to 1842.

The case was argued in last *Easter* term (*a*).

Crowder, for the prosecution. The county is liable to repair this bridge. All bridges of this kind must, since stat. 53 Geo. 3. c. xcii. s. 67., be repaired in the same way as those usually called county bridges; that is, since 1842, at the expense of the county. The defendants, in order to rebut this liability, must shew a distinct liability on the part of some one else. [Lord *Campbell* C. J. It seems an unreasonable construction of the Act to hold that it imposed upon the county the repair of these bridges. Did it not merely include them among the bridges for the repair of which a separate island rate was made?] The separate island rate was made under an arrangement between the county and the island, and did not destroy the common law liability of the county to repair within the

(*a*) Saturday, May 1st. Before Lord *Campbell* C. J., *Wightman*, *Erle* and *Crompton* Js. The other cases were argued on the same day, before the same Judges.

Queen's Bench.
1852.

The *QUEEN*
v.
Inhabitants of
SOUTHAMPTON.

upon the county; but, recognizing the arrangement of Queen's Bench.
1774, provides that they shall be repaired in the same
way as those island bridges usually called county bridges;
that is, by a separate island rate. Sects. 53, 55, 62,
give the Commissioners under the Act power to make
assessments upon the inhabitants of the island for the
repair of the highways; which tends to shew that it
could not have been the intention of the Act to cast the
repair of the bridges in the island upon the county at
large.

The QUEEN
v.
Inhabitants of
SOUTHAMP-
TON.

Secondly, stat. 43 G. 3. c. 59. applies here. The present bridge is clearly a new bridge; the case states that it has been entirely rebuilt; and it was rebuilt, not for the purpose of repair, but of substitution. *Rex v. Devon* (a) is not in point; there the bridge had been carried away by a flood, and the county was liable to replace it.

Crowder, in reply. The island was liable to repair the county bridges in the island only as long as the agreement of 1774 was acted upon; and, even during that period, such liability did not arise by law. The practice under the agreement has been discontinued; the county, therefore, is now liable to repair all the county bridges in the island. Sects. 53, 55, 62, cannot controul the express provisions of sect. 67.

Cur. adv. rult.

SANDOWN BRIDGE.

The case, in addition to the facts stated in the preceding case as to the practice, before and after stat. 53 G. 3. c. xcii., with respect to the repair of bridges

(a) 5 B. & Ad. 383.

by order of the justices of the island division, from the local rate ordered and levied as aforesaid. In 1849 it was repaired by an order of Quarter Sessions, but without prejudice to the question of liability. The Commissioners of Highways under the above named local Act have always repaired the road over the bridge and one hundred yards at each end, down to the year 1842.

*Queen's Bench.
1852.*

The QUEEN
v.
Inhabitants of
SOUTHAMP-
TON.

Crowder, for the prosecution. It will be contended, in addition to the general question as to the liability to repair, that this bridge, having been built higher up the stream than the old bridge for which it was substituted, is a new bridge within the meaning of stat. 43 G. 3. c. 59., and that the provisions of that statute have not been complied with. But it was built by the order of the justices for the island division, acting for the county at large; and the expense was defrayed out of the island rates. Stat. 43 G. 3. c. 59. s. 5. does not, therefore, apply, inasmuch as the bridge has not been built "by or at the expense of any individual or private person or persons."

Kinglake Serjt., for the defendants. The justices for the island division, as such, had no authority to order the bridge to be rebuilt. [*Erle* J. May they not act as a committee appointed by the Quarter Sessions?] That does not appear to have been the fact. If they act as justices for the division only, they must be considered as private persons within the statute. In *Rex v. Derby*(a) trustees under a local turnpike Act were held to be private persons within sect. 5. The building of this bridge is, practically, the same thing as the widening

(a) 3 B. Ad. 147.

of stat. 53 G. 3. c. xcii., it was always repaired by *Shorwell*. Since the passing of that Act, it has usually been repaired by the commissioners under the Act.

Queen's Bench.
1852.

The QUEEN
v.
Inhabitants of
SOUTHAMP-
TON.

Crowder, for the prosecution. It is said that this bridge, being only a foot bridge, is not a county bridge. But that is not necessarily so; *Regina v. Middlesex* (*a*). [Lord *Campbell* C. J. It can hardly be said that every structure which enables passengers to cross a stream is a county bridge.] It has been repaired by the commissioners under stat. 53 G. 3. c. xcii. That raises a presumption that it is a county bridge, which the defendants can rebut only by shewing that the liability to repair rests upon some other party. [Lord *Campbell* C. J. The fact of its having been repaired by the commissioners would rather raise a presumption that it is part of the highway.] That is not alleged in the case. It is called a foot bridge.

Kinglake Serjt., for the defendants. This bridge is nothing more than a continuation of the footpath; and the footpath is clearly not repairable by the county. In *Regina v. Middlesex* (*a*) the foot bridge was built upon, and formed part of, an ordinary county bridge.

Cur. adv. vult.

Lord **CAMPBELL** C. J. now delivered the judgment of the Court.

In this case an indictment was preferred against the inhabitants of the county of *Southampton* for non-repair of a public bridge called *Black Bridge*, situate in the Queen's highway, in the *Isle of Wight*; and the ques-

was passed. That was an Act for amending the roads and highways in the *Isle of Wight*. By the 67th section all bridges within the parishes and places specified in the Act (the bridge in question being in one of them) which had, previous to the passing the Act, been accustomed to be repaired by any parishes, tithings, divisions or townships within the island were to be repaired, after the 11th October then next, *in the same manner, and by such ways and means, as other bridges usually called county bridges within the island had been accustomed to be repaired.* The bridge in question had always been, before the passing of the Act, repaired by the tithing of *Knighton*, in the parish of *Arreton*.

The future repairs of the bridge being, by the 67th section of the Act, declared to be by the same means and in the same manner as other county bridges in the island, we are of opinion that the county generally is liable to the repairs, and that there is nothing in the statute, nor is there any legal ground, upon which the county can claim to be exempt. The statute has taken away the liability of the tithing of *Knighton*, which had previously always repaired the bridge, and has made it repairable by such ways and means as other county bridges in the island. The county bridges in the island were repaired out of a rate, in the nature of a county rate, made at the quarter sessions of the county, upon the parishes in the island. Such a rate, however, could only be conventional; and the sessions would have no authority to make such a rate, in the nature of a county rate, upon the parishes in the island; nor would this conventional mode of dividing the performance of the legal obligation alter the right of the public when the liability to the performance became a legal question.

Queen's Bench.
1852.

The QUEEN
v.
Inhabitants of
SOUTHAMP-
TON.

Queen's Bench.
1852.

MARDALL *against* THELLUSSON and others, execu- *Friday,*
tors of WILLIAM THEOBALD, deceased (a). *June 16th.*

ASSUMPSIT. The first three counts stated that the testator *William Theobald*, in his lifetime, was indebted to the plaintiff for work and labour, money paid, and money due on an account stated, respectively; averring promises by testator in his lifetime. The fourth count set out a special contract between plaintiff and testator, and breach thereof by the latter. The fifth count was for money due from defendants, as executors, on an account stated between plaintiff and defendants, as executors, averring a promise by defendants as such executors.

Third plea: To the first, second, third and fifth counts, a set-off for money had and received by plaintiff to the use of defendants, as executors as aforesaid, and for money due from plaintiff to defendants as executors, on an account stated between them.

Replication, to third plea, traversing the set-off. Issue thereon.

There were other issues in fact.

On the trial, before Lord *Campbell C. J.*, at the *Middlesex* Sittings after last *Hilary Term*, a verdict was given for the plaintiff on all the issues except that on the third plea, and for the defendants upon the issue on the third plea. *Shee Serjt.*, in *Easter Term* following,

An executor sued, as such, for a debt which accrued to the plaintiff from the testator in his lifetime, may set off a debt for money had and received to defendant's use, as executor, and money due on an account stated with him as executor, since the death of the testator; such debts being mutual, within stat. 2 G. 2. c. 22. s. 13.

(a) Expressly overruled in *Rees v. Watts*, 11 *Exch.* 410., in Exch. Chamb., affirming the judgment of Exch. in *Watts v. Rees*, 9 *Exch.* 696.

is noticed in 2 *Williams On Executors*, p. 1596 (4th ed.). *Queen's Bench.*
 [Lord *Campbell* C. J. The language of stat. 2 *G. 2.*

 1852.
 c. 22. s. 13. is that, "if either party sue or be sued as *MARDALL*
 executor or administrator, where there are mutual debts *v.* *THELLUSSON.*
 between the testator or intestate and either party, one
 debt may be set against the other." Here the debts set-
 off against each other are not mutual; one is between
 the testator and the plaintiff, the other between the
 testator's executors, as such, and the plaintiff.] The
 debt between the testator's executors, as such, and the
 plaintiff is, substantially, a debt between the testator and
 the plaintiff; it is claimed as part of his estate, and is
 clearly a debt within the contemplation of the statute.
 In *Blakesley v. Smallwood*(a) it was held that in an
 action against an executor, on an account stated by
 him as such, the defendant might set off a debt
 due from the plaintiff to the testator in his life
 time. That was the converse of the present case.
 [*Crompton* J. There is this distinction, as regards a
 set-off, between an action by, and an action against,
 an executor: that in the first case the assets might be
 affected, if the defendant set off a debt due from the
 testator to him: in the second case the assets would
 not be affected.]

Ogle, contrà. The defendants can rely only on
 stat. 2 *Geo. 2.* c. 22.; and the debt pleaded here by way
 of set-off is not a mutual debt within that statute. The
 defendants might have sued the plaintiff for the debt in
 question, but cannot set it off in an action against them
 to recover a debt due from the testator. Sect. 13 of
 stat. 2 *Geo. 2.* c. 22. applies only to cross debts in the

(a) 8 *Q. B.* 538.

Volume XVIII. same right. The distinction taken as to *Shipman v. Thompson (a)* is immaterial. That case and *Tegetmeyer v. Lumley (b)* are in point for the plaintiff.
MARDALL v. THELLUSSON.

Cur. adv. rult.

Lord CAMPBELL C. J. now delivered the judgment of the Court.

Upon a rule for judgment non obstante veredicto, the question is raised, whether a debt due to the defendants, as executors, for money had and received after the death of the testator can be set off against a debt due from the defendants, as executors, having become due from the testator before his death. Stat. 2 G. 2. c. 22. gives the right of set-off where there are mutual debts between the plaintiff and the defendant: and the debts above mentioned are comprised in these words, they being mutual and due in the same right between the plaintiff and defendant. Although the second clause, authorizing, in the case of a suit by or against an executor, the set-off of a debt due from the testator, does not apply, we think that clause was not intended to restrict the operation of that which preceded.

This construction was adopted in *Blakesley v. Smallwood (c)*; and a set-off of a debt from the plaintiff to the testator was allowed against a count upon an account stated by the executor with the plaintiff. Against this view the plaintiff contended that such a set-off had been held illegal in *Shipman v. Thompson (a)* and the cases referred to in *Willes*, 264, in nota.

But, upon examination, these authorities do not

(a) *Willes*, 103. (b) Note (a) to *Hutchinson v. Sturges, Willes*, 264.
 (c) 8 Q. B. 538.

appear to support the position contended for. In *Shipman v. Thompson* (a) the plaintiff sued for money due to the testator, received by the defendant after his death, and the defendant attempted to set off a debt from the testator before his death; so that the question appears the same, the parties being reversed. But the plaintiff in that case sued in his own right, and not as executor: this he had the option of doing in respect of money received after the death; and, as he was suing in his own right, a debt due from the testator was not a mutual debt within either clause of the statute. In respect of such a debt the executor may sue in either capacity; and, by suing in his own right, and so preventing the set-off, he prevents a creditor from interfering with the distribution of assets; while, on the other hand, if, when sued as executor for a debt due before the death, he is allowed to treat a debt accruing after the death as due to him as executor, the same mischief is prevented. A plaintiff, while wrongfully withholding assets equal to the debt he claims, ought not to be allowed to take from the assets a further amount in payment of that debt, and force the executor to the risk and waste of another action for the assets so wrongfully withheld, instead of making a set-off in the first action.

Queen's Bench.
1852.

MARDALL
v.
THELLUSSON.

Rule discharged (b).

(a) *Willis*, 103.

(b) See p. 857, note (a).

considered that it was just and equitable that the said Company should be so dissolved and wound up; and that the said petition was afterwards, and before the making of the said order, to wit 27th *April*, 1849, advertized in the *London Gazette*, and was, with a copy of the said *Gazette*, served, at the office of the Company, upon the secretary: and that afterwards, and before 1st *August*, 1849, and before the commencement of this suit, to wit on &c., by an order of the Court of Chancery, it was ordered that the Company should be dissolved and wound up under the provisions of the said Joint Stock Companies Winding-up Act, and that it should be referred to the Master to wind up the affairs of the Company; and that, by reason of the premises, the Company became and was, from the date of the said last mentioned order, absolutely and wholly dissolved.

Verification.

The fifth plea contained the same allegations as the fourth plea: and alleged, in addition, that, after the making of the said order absolute, to wit on 24th *May*, 1849, the said order absolute was carried in before the said Master, and that, by his direction, advertisements were published in two successive numbers of the *London Gazette*, and in three other newspapers, by which notice was given that the said Master would, at a day, hour and place therein mentioned, being a day within fourteen days from the day of publication of the first of the said advertisements, to wit on &c., appoint an official manager of the said Company under the said Joint Stock Companies Winding-up Act; and that afterwards, and within fourteen days from the day of publication of the first of the said advertisements, and before the commencement of this suit, the said Master appointed one

Queen's Bench.
1852.

MACKENZIE
v.
SLIGO
and
SHANNON
Railway
Company.

Volume XVIII. **J. E. C.** official manager o
1852.

MACKENZIE
v.
SLIGO
and
SHANNON
Railway
Company.

accepted the said appoin
and still is, the official ma
and that since the appoi
manager no permission w^t
said Master to the plain
with the present action, o
the defendants, or against
the said Company; and t
debt had at any time bee
or otherwise. Verification

General demurrer to bo
The cause was argued l

Raymond, for the plain
First, The Joint Stock
1848 (11 & 12 Vict. c. 45
companies incorporated b
which declares to what cor

(a) June 1st. Before Lord Ca
(b) Sect. 1 declares, among ot
companies corporate or unincorp
Vict. c. 111. and 8 & 9 Vict. c. 98.
November 1844, and which shall l
of registration under stat. 7 & 8 V
would have been within the provis
and 8 & 9 Vict. c. 98., if they ha
trade at the time of the passing
companies which would have been
not been specially excepted from
and to all companies which, under
shall before 1st March, 1848, ha
associations, and partnerships, to
whereof the capital or the profit
shares, and such shares transferal
copartners.

certainly does not include railway companies of that description; and sect. 1 of The Joint Stock Companies Winding-up Amendment Act, 1849 (12 & 13 Vict. c. 108.), which amends and explains The Joint Stock Companies Winding-up Act, 1848, and which, by sect. 38, is to be taken as part of that statute, expressly excepts from the application of the Act of 1848, "railway companies incorporated by Act of Parliament." At all events, therefore, any proceedings taken under that Act in the present case since 1st *August*, 1849, the date of the passing of stat. 12 & 13 Vict. c. 108., would be invalid. [Lord *Campbell* C. J. The order in Chancery was made before that date.] The defendants rely on stat. 13 & 14 Vict. c. 83. s. 30., which provides that, notwithstanding the provision of The Joint Stock Companies Winding-up Amendment Act, 1849, that Act and the Winding-up Act of 1848 shall apply "to any railway Company incorporated by Act of Parliament in respect of which an order may have been made by the Court of Chancery for winding up the affairs of such company previous to the passing of the said Joint Stock Companies Winding-up Amendment Act, 1849, and the proceedings for winding up the same shall proceed and be carried on under the said" Acts "or either of them." But that provision is only prospective, and renders valid only those proceedings, under the Acts in question, against a railway company incorporated by Act of Parliament, which have been taken since 14th *August*, 1850, the date of the passing of stat. 13 & 14 Vict. c. 83. It could not have been intended to apply to proceedings taken under The Joint Stock Companies Winding-up Amendment Act, 1849.

Queen's Bench.
1852.

MACKENZIE
v.
SLIGO
and
SHANNON
Railway
Company.

1848. Now that section does not absolutely bar the action, but only provides for a suspension of proceedings until proof is made of the claim. But the Act did not, at the time when the action was commenced, which was after the passing of The Joint Stock Companies Winding-up Amendment Act, 1849, and before the passing of stat. 13 and 14 Vict. c. 83., apply to railway companies incorporated by Act of Parliament. The plaintiff, therefore, could not have proved his claim before the Master. It is true that stat. 13 & 14 Vict. c. 83. s. 30. brings railway companies incorporated by Act of Parliament within the operation of the Joint Stock Companies Winding-up Acts, 1848 and 1849; but that does not, retrospectively, deprive the plaintiff of the right which he previously had at common law of suing the Company. In *Hitchcock v. Way* (*a*) it was laid down that, where the law is altered by statute, pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the Legislature, by the language used, shews a clear intention to vary the mutual rights. *Edwards v. Sherren* (*b*), *Moon v. Durden* (*c*) and *Marsh v. Higgins* (*d*) were decided upon the same principle. [Lord Campbell C. J. Stat. 13 & 14 Vict. c. 83. is clearly retrospective, both in its object and in its terms.]

Wordsworth, contrà. In *Ex parte Barber* (*e*) it was held that a railway company, provisionally registered, and which had become abortive, was within the provisions of stat. 7 & 8 Vict. c. 111., and therefore within

(*a*) 6 A. & E. 943.

(*b*) 11 M. & W. 595.

(*c*) 2 Exch. 22.

(*d*) 9 Com. B. 551.

(*e*) 1 Macn. & G. 176.

Queen's Bench.
1852.

MACKENZIE
v.
SLIGO
and
SHANNON
Railway
Company.

Volume XVIII. those of The Joint Stock Companies Winding-up Act, 1852.
MACKENZIE v. 1848, by sect. 1 of the latter statute. [Lord *Campbell* C. J. We need not discuss the original effect of that Act, if proceedings taken under it against railway companies incorporated by Act of Parliament have been retrospectively made valid by stat. 13 & 14 *Vict. c. 83.*]

SLIGO and SHANNON Railway Company.

Then, as to the fifth plea. It is not contended that the plaintiff's right of action is barred, but that he cannot sue without proving his claim before the Master. The defence is in accordance with the decisions in *Macgregor v. Keily* (*a*), *Thompson v. Universal Salvage Company* (*b*), cited there, and *Prescott v. Hadow* (*c*).

Raymond, in reply. Sect. 73 of the Joint Stock Companies Winding-up Act, 1848, provides a specific mode of putting a stop to the action, by application to a judge for an order to stay proceedings until proof of the claim. The defendants are not at liberty to plead the omission to prove by way of bar.

Cur. adv. vult.

Lord **CAMPBELL** C. J. now delivered the judgment of the Court.

In this case, upon a demurrer to the fourth plea in bar of the action, the question has been raised, Whether the dissolution of the Company under The Joint Stock Companies Winding-up Act, 11 & 12 *Vict. c. 45.*, was a bar to the action: and, upon the demurrer to the fifth plea, the question is raised, under sect. 73 of the same Act, Whether the omission to prove the claim

(*a*) 4 *Exch.* 801.

(*b*) 3 *Exch.* 310.

(*c*) 5 *Exch.* 726.

before the Master was a bar. We are of opinion that there ought to be judgment for the plaintiff on these demurrers, the pleas being bad. There is no provision in the statute taking away the common law remedies for a debt upon a dissolution under the statute: on the contrary, by sect. 58, it is enacted that nothing in the Act shall alter or affect the rights or remedies of creditors. And, with respect to prohibiting any action after an order for dissolution until proof before the Master, under sect. 73, it is clear that no bar to the action is created, but a suspension until proof made or exhibited, after which the creditor is at liberty to proceed with the action, as was decided in *Prescott v. Hadow* (a). As the 73d section provides an appropriate remedy for suspension of the action until after proof, by application for an order to stay proceedings, full effect is given to all parts of the section by holding that the action may be stayed, by judge's order, until after proof, but is not barred altogether.

*Queen's Bench.
1852.*

MACKENZIE
v.
SLIGO
and
SHANNON
Railway
Company.

Judgment for plaintiff.

(a) 5 *Exch.* 726.

Volume XVIII.
1852.

Friday,
June 18th.

BATEMAN *against* BLUCK.

Trespass for entering plaintiff's close and pulling down a wall therein.
Plea: That the close was a public pavement within the Metropolitan Paving Act, 57 G. 3. c. xxix.; that plaintiff, unlawfully and contrary to the Act, erected thereon the said wall; and, because the wall incumbered the pavement, and plaintiff refused, on defendant's request, to remove the same, defendant entered and pulled it down.

Held, on motion for

judgment Non obstante veredicto, that the plea was bad for not shewing that it was absolutely necessary for defendant, in order to exercise the alleged right of passage, to remove the wall.

A public highway may, in law, exist over a place which is not a thoroughfare. Whether, in fact, it does exist or not, is a question for the jury.

(a) Local and personal, public. "For better paving, improving and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein." (Printed in the Statutes at Large.)

(b) "For the better relief and employment of the poor within that part of the parish of St. Sepulchre, which is in the county of Middlesex; and for paving, cleansing, lighting, watching, and regulating the squares, streets", &c., "within the same; and for removing annoyances therefrom" &c.

and that the said close was not at the said time when &c., nor was any part thereof, a turnpike road or any part of any turnpike road; and that, just before the said time when &c., the plaintiff had, contrary to the provisions of the first mentioned Act, unlawfully laid in and upon the said public footway pavement divers bricks &c., and had therewith formed and constructed in and upon the said pavement the said wall in the declaration mentioned; and, because, at the said time when &c., the said wall remained on and incumbering the said public pavement, and because the plaintiff then, upon the reasonable request of the defendant, refused to remove the same, the defendant, at the said time when &c., entered upon the said close for the purpose of pulling down the said wall, and removed the bricks and other materials to a small and convenient distance, and there left the same for the use of the plaintiff, doing no unnecessary damage: which are the same alleged trespasses &c.

Replication: That the said close was not, at the time when &c., a paved public place within the true intent and meaning and subject to the provisions of the said first mentioned Act. Issue thereon.

Fourth plea: That, before and at the said time when &c., there was and of right ought to have been, into, through, over and along the said close, a public and common highway for all the Queen's subjects to go and return, pass and repass, on foot, at all times, at their own will and pleasure; that defendant, before and at the said time when &c., was possessed of a dwelling house abutting on and having a door opening into the said highway; and, because the plaintiff had wrongfully erected

Queen's Bench.
1852.

BATEMAN
v.
BLUCK.

Volume XVIII. in and upon the said highway the said wall so near to
1852. the said door of the defendant as to obstruct the same,

BATEMAN

v.

BLUCK.

so that defendant could not, without prostrating the said wall, pass along the said highway into and from the said house, and because plaintiff, at the time when &c., refused, upon reasonable request of defendant then made to him in that behalf, to remove the said wall, defendant, at the said time when &c., entered upon the said close for the purpose of pulling down, and did pull down, the said wall &c. (justifying as in the third plea).

Replication: That there was not, nor of right ought to have been, into, through, over and along the said close, a public and common highway &c., as in the plea alleged. Issue thereon.

On the trial, before Coleridge J., at the *Middlesex* Sittings after last *Easter* Term, it appeared that the alleged close was a court opening into a public street in the parish of *St. Sepulchre*. There was no thoroughfare through the court. It contained fourteen or fifteen houses. The defendant was tenant of one of these houses, which had a door opening into the court, made by a previous tenant. The defendant had been required by the plaintiff to block up the door, which he refused to do; whereupon the plaintiff erected the wall in question and thereby blocked up the door; upon which the defendant pulled the wall down. The wall was erected on the pavement of the court; and the court had been paved, at the request of the plaintiff, by the Commissioners under stat. 12 *Geo. 3. c. 68.* It was objected, for the plaintiff, that the third and fourth pleas were not proved, inasmuch as the court

was not a public place within the meaning of stat. 57 G. 3. c. xxix., and, not being a thoroughfare, could have no highway through it. The learned Judge directed a verdict for the plaintiff on the first issue and on so much of the second issue as related to the wall, and for the defendant on the residue of the second issue, and on the third and fourth issues, with leave to move to enter the verdict for the plaintiff on the third and fourth issues.

*Queen's Bench.
1852.*

BATEMAN
v.
BLUCK.

Knowles, in last *Easter Term*, obtained a rule *Nisi* according to the leave reserved, and also to enter judgment for the plaintiff *Non obstante veredicto* on the third issue.

Montague Chambers and *Lush* now shewed cause (*a*). First, as to the fourth plea. The close in question is a highway. It is objected that there is no thoroughfare through it: but in *The Trustees of The Rugby Charity v. Merryweather* (*b*) Lord *Kenyon* observed that a thoroughfare was not necessary to make a place a highway. *Woodyer v. Hadden* (*c*) will probably be relied on: but the decision there did not turn upon this particular point, with respect to which *Chambre J.*, in giving judgment, remarked that the decision in *The Trustees of The Rugby Charity v. Merryweather* (*b*) had been generally acquiesced in. [Lord *Campbell C. J.* Unless the place be used as a public passage, what use can the public make of it?] That difficulty was suggested by

(*a*) The argument commenced on June 10th, before Lord *Campbell C. J.*, *Coleridge, Erle and Crompton Js.*

(*b*) Note (*a*) to *Daniel v. North*, 11 *East*, 375. See *Rex v. The Marquis of Downshire*, 4 *A. & E.* 698.

(*c*) 5 *Tenant*. 125.

and remove the obstruction, unless it interfere directly and unavoidably with a right of his own.] That certainly makes it difficult to support the third plea.

Queen's Bench.
1852.

BATEMAN
v.
BLUCK.

Garth, contra. As to the fourth plea, there was no evidence that the court in question was a highway. It appeared that it was a *cul de sac*; and it could not be a highway unless it were a thoroughfare. [Lord *Campbell* C.J. May not a square, or public promenade, having only one entrance, be a highway?] Perhaps so; but here there was no evidence to shew that it was a public place. In *Hawkins's Pleas of the Crown*, Book I. c. 76. s. 1. (vol. II. p. 152. 7th ed.) it is said "that every way from town to town may be called a highway, because it is common to all the King's subjects, but that a way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village, which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, may be called a private way, but not a highway, because it belongeth not to all the King's subjects, but only to some particular persons, each of which, as it seems, may have an action on the case for a nuisance therein." The correctness of the decision in *The Trustees of The Rugby Charity v. Merryweather* (a) was much questioned by *Mansfield* C.J. in *Woodyer v. Hadden* (b). [Lord *Campbell* C.J. In the latter case it was held that there was no dedication to the public.] Here there is still less evidence of any dedication. In *Wood v. Veal* (c) two of the Judges express their dissent from the doctrine laid down in *The Trustees of The Rugby Charity v. Merryweather* (a).

(a) 11 *Eas.* 375. n. (a). (b) 5 *Taut.* 125.

(c) 5 *B. & Ald.* 454.

v. *Hadden* (a) the Court did not decide that there could not be a highway under such circumstances, but only that in that particular case there was none; and I do not find anything decided there which is necessarily inconsistent with what was laid down by Lord *Kenyon*. The fourth plea, therefore, being proved, and being unexceptionable on the face of it, the defendant is entitled to our judgment.

Queen's Bench.
1852.

BATEMAN
v.
BLUCK.

COLERIDGE J. The third plea being given up, the question is, whether there was a highway through the locus in quo, as alleged in the fourth plea. It was proved that the court in question had one opening only into a public street; that it contained some fifteen houses, belonging to one person, but occupied by different tenants; that it was paved by the commissioners at the request of the plaintiff, and had always been lighted by the parish. The jury found that there was a public highway through it; and I am of opinion, as I was at the trial, that there was evidence for them, both of a dedication to, and of a user by, the public. The finding, therefore, upon the facts, is satisfactory. But it is objected that there cannot, in law, be a highway through a place which is not a thoroughfare, and that, therefore, I was not justified in telling the jury that there might be a highway through the court, and leaving it to them to say, upon the evidence, whether there was or not. I cannot see any such legal impossibility as has been suggested. It is suggested that the way through such a place as this must be assumed to be for the use of the inhabitants only; but surely it is for the jury to say whether there has or has not been a dedication and user. More or less user may be proved

(a) 5 *Tennet.* 126.

directed not to be demanded or in any way made available till his said son should attain the age of twenty one, and not then if his sons *Edward* and *Charles* should agree to enter into copartnership; but, if, on the contrary, a copartnership could not be agreed on, then the payment of the said note might be enforced, but without interest: that the testator appointed plaintiff and two others, one of whom was now deceased, his executors: that the testator died so possessed of the said note, without revoking or altering his said will as to the said bequest: that the plaintiff proved the said will and assented to the said bequest; whereupon and whereby the said *Charles Curtis* became entitled to the said note and to the money due thereon: that afterwards, and while the said *C. Curtis* was so entitled, and before the commencement of this suit, to wit on &c., the said *C. Curtis* was convicted of felony and sentenced to transportation for a term not yet expired; by reason of which said felony, and by force of the said judgment, the said *C. Curtis* forfeited to our Lady the Queen the said promissory note and the money due thereon and all causes of action in respect thereof. Verification.

Replication, suggesting the death of the remaining co-executor since the last pleading, and setting out the will of the testator verbatim, which contained the bequest as alleged in the plea. Verification.

Special demurrer. Joinder.

Maxwell, for the defendant. The replication is no answer to the plea. The testator made his will after the passing of stat. 7 W. 4 & 1 Vict. c. 26., which provides, by sect. 3, that it shall be lawful for every person to bequeath all personal estate to which he shall be entitled

Queen's Bench.
1852.

BISHOP
v.
CURTIS.

Volume XVIII. at the time of his death, and which, if not so disposed of, would devolve upon his executor or administrator.

BISHOP
v.
CURTIS.

The note in question, therefore, passed to *Charles Curtis* under the will. [Lord *Campbell* C. J. Stat. 7 W. 4 & 1 Vict. c. 26. does not give the power of bequeathing any other kinds of personalty than those which could be bequeathed before, although it gives additional powers as to realty.] Sect. 1 includes, in the definition of personal estate, debts and choses in action. Therefore the right of suing upon this note, which is a chose in action, and which, if not bequeathed, would vest in the executor, may now be bequeathed by will. [Lord *Campbell* C. J. If so, the assent of the executor would not be necessary.] No doubt the legatee would take the bequest subject to the right of the executor to treat it as assets for the payment of the testator's debts. But here the plea alleges the assent of the executor. [*Crompton* J. His assent would pass the property in the note to the legatee, but not the right to sue.] That would depend on what it was the testator's intention to bequeath: he could, if he chose, bequeath not only the instrument itself, but the right of suing on it, under sects. 1, 3. [*Coleridge* J. Suppose the legatee here had not been convicted; how could he have sued?] He could have averred the bequest, and the assent of the executor. [Lord *Campbell* C. J. The will declares that payment of the note is not to be enforced till a particular time; would the legatee have any legal right in the note before that time arrived?] At all events he would have a beneficial interest; and that would pass to the Crown by his conviction. In *Hawkins's Pleas of the Crown*, Book II. c. 49. s. 9. (vol. IV. p. 480. 7th ed.), it is said that "all things whatsoever which are com-

prehended under the notion of a personal estate, whether they be in action or possession, which the party hath, or is entitled to in his own right, and not as executor or administrator to another, are liable to such forfeiture ;" and one of the instances there given (sect. 10) is "a bond taken in another's name." The same doctrine is laid down in *Bracton*, as to outlawry, fol. 132 b., lib. III. c. 14. s. 12. In *Bullock v. Dodds* (*a*), where these authorities are cited, it was held that to an action on a bill of exchange, indorsed to the plaintiff after his attainer, such attainer might be pleaded in bar. [*Crompton J.* If the legatee here had been the legal promisee, no doubt his right would have been forfeited.]

Queen's Bench.
1852.

BISHOP
v.
CURTIS.

Hoggins, contrà, was not called upon.

Lord CAMPBELL C. J. The plea is bad. It is admitted that before stat. 7 W. 4 & 1 Vict. c. 26. the property in this note, and the right to sue upon it, would not have vested in *Charles Curtis*, under the will; but it is contended that, under sect. 3 of that statute, they could be legally bequeathed. That is a misconstruction of the Act. The Legislature did not intend to make any kind of personality bequeathable which was not bequeathable before, but only, as regards that kind of property, to regulate the form of executing wills. With respect to real estate, it does provide that some kinds not previously devisable, such as rights of entry, may be devised. But there is nothing to shew an intention of enabling a testator to bequeath a chose in action, so as to pass the right to sue. That right was certainly in

(a) 2 B. & Ald. 258.

Queen's Bench.
1852.

MARSHALL
v.
NICHOLLS.

Her Majesty and the King of the *French* concerning the fisheries in the seas between the *British Islands* and *France*") trawl fishing is forbidden in all places where there are boats engaged in herring or mackerel drift net fishing; and it is enacted that trawl boats shall always keep at a distance of at least three miles from all boats fishing for herrings or mackerel with drift nets: And whereas, before and at the time &c., and after the passing of the said Act, the plaintiffs were lawfully possessed of a certain boat, together with certain drift nets and other materials and implements for fishing for herrings, of the value of 200*l.*; and afterwards, to wit on &c., plaintiffs were, with their said boat, with the said nets, materials and implements, on the high seas, lawfully engaged in herring drift net fishing, which the defendant well knew, and whilst plaintiffs were in the said part of the high seas aforesaid, so engaged as aforesaid, defendant was then and there possessed of a certain other boat with materials and implements for trawl fishing: and plaintiffs say that, pursuant to and by virtue of the said Act, it became and was the duty of defendant to abstain from trawl fishing where plaintiffs in their said boat were engaged in herring drift net fishing; and it was, pursuant to and by virtue of the said Act, the duty of defendant, if defendant, in his said boat, commenced or engaged in trawl fishing, to keep, while so engaged, at a distance of three miles from the said boat or vessel of plaintiffs whilst plaintiffs were so engaged as aforesaid: Yet defendant, well knowing the premises, and disregarding his said duty, and contriving &c. to injure plaintiffs in that behalf, whilst plaintiffs were so engaged as aforesaid, wrongfully and unjustly, and contrary to his said

aware of the position of the boat of the plaintiffs, *Queen's Bench.*
knowingly came within three miles. [Coleridge J. And
1852.

Archibald, contrà. First, the plea is good. The declaration is for breach of a statutory duty: the plea, therefore, raises a good defence by shewing that the plaintiffs were not following their occupation under the provisions of the statute, so that the statutory duty on the part of the defendant did not arise. The hoisting

MARSHALL
v.
NICHOLLS.

Volume XVIII. of lights is clearly a condition precedent to the right of the plaintiffs to sue in respect of the collision.

MARSHALL
v.
NICHOLLS.

Next, the declaration is bad. The averment of notice is not sufficient. It should have been averred, at all events, that the defendant knew that he was within three miles of the boat of the plaintiffs. Moreover, the declaration does not shew that the collision took place in that part of the high seas to which the Act applies; that is, between the United Kingdom and *France*.

But, further, no action at common law lies for a collision caused by a breach of the statutory duty. Articles 69, 70, 71, 75, provide that all contentions of this kind shall be "submitted to the exclusive jurisdiction of the tribunal or the magistrates which shall be designated by law;" that is, in *England*, by sect. 11, any magistrate having jurisdiction in the place in which or in the waters adjacent to which the offence is committed, or to which the offender is brought; and that the proceedings shall be conducted in a summary manner before such tribunals, which are empowered to inflict pecuniary and other penalties for breaches of the statute, and to award compensation to the injured parties. This statutory remedy, being exclusive, ousts the plaintiffs of their remedy by action, according to the principle of the decisions in *Crisp v. Bunbury* (a) and *Stevens v. Jeacocke* (b).

S. Temple, in reply. The remedy by statute here is cumulative, not exclusive. The action is not simply for a breach of the statutory duty, but for consequential damage caused by such breach (c). [Erle J. In *Stevens*

(a) 8 *Bing.* 394.

(b) 11 *Q. B.* 731.

(c) See *Couch v. Steel*, 3 *E. & B.* 402.

v. *Jeacocke* (a) the plaintiff lost a large quantity of fish by the defendant's breach of the statute.] The fish were not his, except by the statute; there was no loss for which he could have sued at common law. Here the statutory remedy is not coextensive with the injury: the common law right of action, therefore, is not excluded; *Mayor of Lichfield v. Simpson* (b). *Albon v. Pyke* (c) is also in point.

Queen's Bench.
1852.

MARSHALL
v.
NICHOLLS.

Lord CAMPBELL C. J. I am clearly of opinion that the last objection made by the defendant is fatal. No action can be maintained for such an injury as this. The defendant has violated the 25th article of the treaty, which, by sect. 1 of the statute, is to have all the force of an Act of Parliament. The declaration alleges that it was the defendant's duty to observe that article; and his neglect to do so is the breach laid. Now article 69 declares that all transgressions of these regulations shall be submitted to the exclusive jurisdiction of "the tribunal or the magistrates which shall be designated by law." Such tribunal is to decide "all differences" and "all contentions, whether arising between fishermen of the same country, or between fishermen of the two countries;" and, by articles 71, 75, may adjudge penalties, and award and enforce the payment of damages to the injured party. Then, if we refer to sect. 11, we find that the competent tribunal in *England* is "any magistrate or justice of the peace having jurisdiction in the county or place in which or in the waters adjacent to which the offence shall be committed or to which the offender shall be brought;" and, again, by sects. 11, 14, such magistrate may impose

(a) 11 Q. B. 731.

(b) 8 Q. R. 65.

(c) 4 Man. & G. 421.

tribunal provided by the statute, no action at common law lies for such breach. *Queen's Bench.*
1852.

MARSHALL
v.
NICHOLLS.

ERLE J. The plaintiffs complain that the defendant, when trawling, did not keep at a distance of three miles from their boat, they being engaged in drift net fishing. It is clear that this would have been no ground of complaint but for the statute; and the statute provides a specific and exclusive tribunal for the decision of all disputes between *French* and *English* fishermen arising within its jurisdiction. No action at common law, therefore, will lie where, as in the present case, that tribunal has jurisdiction in the dispute. *Mayor of Lichfield v. Simpson* (*a*) and *Albon v. Pyke* (*b*) are not in point. In the first of those cases the remedy created by statute was not coextensive with the injury; in the second the action was brought upon a promissory note, which did not appear to have been taken for money lent, and the statute did not create any right to bring such an action.

(CROMPTON J. was absent.)

Judgment for defendant.

(*a*) 8 Q. B. 65.

(*b*) 4 Man. & G. 421.

AN

I N D E X

TO

THE PRINCIPAL MATTERS.

ABANDONMENT OF RAILWAY ACT.

Page 862. *Railway*, I. 1.

ABATEMENT.

Of public nuisance by private individual, 870. *Highway*, I.

ACCIDENT.

Occasioned by misfeasance.

Measure of damages, 93. *Death*, I.

ACCOUNT STATED.

I. Evidence.

Necessity for shewing some item to a specific amount agreed on.

A plaintiff cannot recover on an account stated without shewing some item, to a specific amount, agreed upon as due; though a single item would be sufficient.

Plaintiff, to prove an account stated, gave in evidence a letter in which defendant wrote to plaintiff: "Oblige me by holding my cheque till *Munday*, and in the interim I will send you the amount in cash." The cheque, being post-dated, could not be read as

evidence; and there was no further evidence of the amount admitted by defendant to be due.

Held, by Lord *Campbell* C. J., *Wightman* and *Crompton* Js., That the plaintiff could not recover even nominal damages.

By *Erle* J. That nominal damages might be given, the letter shewing that a definite sum had been arrived at in account, though the amount could not be proved. *Lane v. Hill*, 252.

II. Effect of admitting an amount as stated in a document which cannot be read in evidence, 252. *Ante*, I.

ACKNOWLEDGMENT.

I. Generally.

When it does not amount to an account stated, 252. *Account Stated*, I.

II. To take debt out of Statute of Limitations.

Distinction between an absolute acknowledgment and the expression of a hope.

T. owed to *P. & Co.*, before their bankruptcy, 275*l.* as surviving partner of *T. Y. & Y.*, and 6565*l.* due independently of that partnership. As

III. Suspension.

Till after proof under Winding-up
Acts, 862. *Railway*, I. 1.

IV. Proceedings when stayed.

Until proof is made under Winding-
up Acts, 862. *Railway*, I. 1.

ADJUDICATION.

Order bad for not shewing adjudication.

An order, made by two justices under the Tithe Commutation Act, 5 & 6 Vict. c. 54. s. 16., for payment, by way of contribution, of a proportion of rent charge on a close, after stating that complaint on oath had been made, before one of the said justices, of the several matters giving them jurisdiction to make the order, proceeded as follows: "And now at this day the said" (complainant and the party summoned) "appear before us the undersigned justices, and we, having examined into the merits of the said complaint, do, in pursuance of the statute in that case made and provided, determine that the just proportion" &c. "to be contributed by *E. W.*" (on whom the order was made) "in respect of the said close" is &c. The order then declared the amount of the proportion payable, and ordered payment.

Held, that the order, upon the face of it, was insufficient, inasmuch as it did not shew any adjudication, express or implied, of the truth of the matters of complaint. *Regina v. Williams*, 393.

ADMISSION.

I. Explanation of mistake, 722. *Bank*, I.**II. See also *Acknowledgment*.**

AGENT.

I. Nature of the agency

1. When certain landowners or their agents are made commissioners by statute: manner and time of appointment.

A local drainage Act created the lords or ladies of three manors, or, in his, her or their absence, their agents appointed in writing under their hands, commissioners for executing the Act; it authorized the commissioners to take lands for the purposes of the drainage; and it contained clauses for that purpose to the same effect as those in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18.), subsequently passed: And it provided that no person should be capable of acting as a commissioner or agent for a commissioner till he had made a declaration that he would duly execute the powers in the exercise of which he should act as commissioner or agent.

The three lords of the manors, by writing under their hands respectively, appointed the defendants their agents; but without having first made the declaration. The defendants acted as commissioners (first making the declaration), and gave plaintiff a written notice that they required to take, for the purposes of the Act, 3 acres, 1 rood, 25 perches, of his land: describing the specific acres, rood and perches. Plaintiff refused to treat; and the commissioners thereupon issued a warrant to the sheriff of the county to summon a jury to assess the sum to be paid for the purchase of 3 a. 1 r. 25 p. of land, required for the purposes of the Act; but the warrant did not recite or refer to the notice, nor describe specifically which 3 a. 1 r. 25 p. were required. Plaintiff had two hundred acres of land in the district. Both the notice and warrant were in the defendants' names as commissioners. A jury was impanelled, and assessed the price of 3 a. 1 r. 25 p. pointed out to them, which were in fact the same land specifically described in the notice. An inquisition was drawn up, reciting the warrant but not the notice, and not shewing specifically in respect of which 3 a. 1 r. 25 p. of plaintiff's land the price was assessed. Plaintiff, who had throughout protested against the proceedings, refused to receive the price so assessed. Defendants paid into the Bank (under a section in the Local

ALTERATION.

In dominant tenement, 112. *Easement*, III.

AMBIGUITY.

In form of instrument.

Bill or note, 471. *Bills*, I.

AMENDMENT.

At Nisi Prius, 640. *Executors*, I. 1.

ANCIENT LIGHT.

See *Easement*.

ANNUITY.

Surety bond.

Successive breaches : statute of limitations ; bankruptcy, 593. *Bond*, I.

APPEAL.

I. From decision of judge at chambers.

Within what time to be made.

In April, 1851, plaintiff recovered in a superior Court a sum under 40s. In June, 1851, he took out a summons before a Judge at Chambers, for costs, under stat. 13 & 14 Vict. c. 61. s. 13. The Judge, conceiving that, although concurrent jurisdiction was proved, he had a discretion as to making an order for costs, indorsed the summons with the words "no order." In January, 1852, plaintiff moved the Court of Queen's Bench to be allowed the said costs.

Held, that the application must be considered as an appeal from the decision of the Judge at Chambers ; and that it was made too late.

Per Lord Campbell C. J. Applications in the shape of an appeal from the decision of a Judge at Chambers should be made within the term next after such decision. *Meredith v. Gittins*, 257.

II. To sessions : Borough or County.

Appeal against order of maintenance of pauper lunatic, 361. *Poor*, XII.

III. Time of appealing.

Against decision of Judge at chambers, 257. *Ante*, I.

IV. Notice sent by post.

At what time deemed to have been given, 388. *Poor*, X.

V. Contesting appeals.

Consent of vestry, 682. *Poor*, V. 1.

VI. Hearing : interested justice.

1. What is interference of an interested justice, and the consequences, 416. *Certiorari*, I.

2. What accidental presence without interfering does not vitiate.

The mere presence on the Bench of an interested magistrate during part of the hearing of an appeal is not sufficient ground for setting aside an order of Sessions made on such hearing, if it be expressly shewn that he took no part in the hearing, came into Court for a different purpose, and did not in any way influence the decision. *Regina v. London, Justices*, 421 n.

VII. In particular instances.

Against order of maintenance of pauper lunatic, 361. *Poor*, XII.

APPEARANCE.

Recognizance to appear and answer indictment. *Reg. Gen.* 251.

APPLICATION.

Second application.

Renewal when allowed on supplying defect of mere form.

The attestation of a warrant of attorney was as follows : "Signed, sealed and delivered" &c., "in the presence of me, H. C." (an attorney), "who, at the request and in the presence of the said J. H. B., J. C. and

J. H. P." (the executing parties), "have set and subscribed my name as the attorney on their behalf attesting the execution hereof, having first read over and explained to them and each of them the nature and contents hereof. *H. C.*"

Held, not a sufficient compliance with stat. 1 & 2 Vict. c. 110. s. 9.

On motion to set aside a Judge's order made at Chambers upon reading certain affidavits, the party moving omitted to bring before this Court the affidavits produced at Chambers; and the rule was therefore discharged with costs. Held, that he might (after payment of costs) renew the same motion, putting in the affidavits. *Pocock v. Pickering*, 789.

APPOINTMENT.

Of agent to act as commissioner under a local act, 831. *Agent*, I. 1.

APPORTIONMENT.

Salary when not apportionable.

The salary of an auditor and superintending manager of an estate, holding office during the joint lives of the employer and himself, is not a payment apportionable under stat. 4 & 5 W. 4. c. 22. s. 2.

The indenture by which *L.*, the auditor, engaged himself stipulated that *L.*, who was a barrister, should relinquish so much of his practice as was incompatible with the office, and the whole if required by *S.*, the employer: that, if *S.* should revoke the appointment without adequate cause, the adequacy to be determined as after mentioned, or if *L.* should resign upon adequate cause, the adequacy to be determined in like manner, *S.* should allow *L.* a retiring pension of 1000*l.* a year during their joint lives: and that the adequacy of the cause for any revocation or resignation should be determined by a referee, who was named; with a proviso for other reference in case of necessity. Held:

That the stipulation for reference was not void as ousting the Courts of jurisdiction. But

ASSIGNEE.

That *L.*, being dismissed, as he alleged, wrongfully, might sue for the retiring pension without having first procured the adequacy of the cause to be decided upon by the referee; the sense of the agreement being that the onus of proving the adequacy of the cause to be adjudicated upon should lie upon that party who did an act (whether revocation or resignation) determining the employment. *Lowndes v. Stamford, Earl*, 425.

APPREHENSION.

See *Arrest*.

ARBITRATION.

Prospective covenant that a preliminary matter shall be determined by a referee.

1. When not void as ousting Court of jurisdiction, 425. *Apportionment*.
2. Burthen of compliance, on which party it lies, 425. *Apportionment*.

ARGUMENTATIVENESS.

In pleading, 2. *Assurance*, I.

ARMY.

Pay, 692. *East India Company*.

ARREST.

On criminal charge.

Pleading: belief: new assignment, 378. *Imprisonment*.

ASSIGNEE.

- I. When bound by covenant though not named, 661. *Covenant*, I. 1.
- II. Of bankrupt. *Bankrupt*.

ASSUMPSIT.

Indebitatus.

Against corporation, for use and occupation, 632. *Corporation*, I. 1.

ASSURANCE.

I. Parties.

Joint or several liabilities of subscribing or nonsubscribing directors.

Declaration against five defendants stated that defendants were proprietors and shareholders of, and partners in, a company called *The M. Assurance Company*: that plaintiff caused to be made a policy on ship &c. purporting that he made insurance at and from &c. against certain risks, which the said Company were contented to bear: and it was declared and agreed by and between the Company and the assured, That the capital stock and funds of the Company should alone be liable to answer and make good all demands under the policy, and that no proprietor of the Company should be in anywise liable to any demands, nor be in anywise charged, by reason of the said policy, beyond the amount of his share in the capital stock, it being one of the original and fundamental principles of the Company that the responsibility of the individual proprietors should in all cases and under all circumstances be limited to their respective shares in such capital stock: And the policy further stated that the Company were contented, and bound themselves, to the assured for the true performance of the premises: The count then alleged that, in consideration that plaintiff had paid the premium and promised defendants to perform all things in the policy contained to be performed on his part, defendants promised plaintiff that they would become and be insurers to plaintiff of 1100*l.* on the said ship during the time in the policy mentioned, and would perform all things therein contained on their part as such insurers

of 1100*l.* to be performed; and defendants then became and were insurers to plaintiff, and subscribed the policy as such insurers of 1100*l.* on the said ship. The count then averred total loss, and non-payment, although the capital stock and funds of the Company had always been sufficient to pay plaintiff the 1100*l.*

One defendant demurred to the count, alleging uncertainty, and other grounds of special demurrer.

A second, *J. G.*, pleaded Non Assumpsit; and that the stock and funds had not been and were not sufficient.

A third pleaded that the policy was made after stat. 35 *G. 3. c. 63.*, and that defendant's name was not expressed or specified on the policy; whereby the insurance became and was null: Special demurrer, alleging that the plea was an argumentative denial of defendant's subscription.

A fourth defendant pleaded that he was proprietor of fifty shares only, of 100*l.* each, and, before action brought, had paid claims and demands upon the Company in respect of insurances to the amount of more than 5000*l.* of his own moneys. Demurrer to the plea as being an argumentative denial of the sufficiency of the capital stock, and as amounting to a traverse of the promise, and as uncertain.

Held by the Court of Queen's Bench:

That the policy, as set out in the declaration, shewed a joint liability, capable of being enforced at law if the Company had sufficient capital stock and funds; which it appeared by the count they had: That an execution of the policy by the defendants sufficiently appeared: and that the count was good both on general and on special demurrer.

And that no material distinction arose in the case of the fourth defendant from his having paid on policies a sum equal to his subscription.

Also, as to the third defendant, that the insurance being stated in the declaration to have been made by the Company, of which he was one, it was immaterial, since stat. 5 *G. 4. c. 114.*, that individual subscribers were not named in the policy.

ASSURANCE.

And, by *Erle* and *Wightman* Js., that his special plea was an argumentative Non Assumpsit.

On the trial of the cause, the second defendant, *J. G.* (no other appearing), tendered a bill of exceptions. The evidence and ruling which raised the exception were as follows :

The defendants were associated in a partnership for the purpose of effecting insurances ; the capital to consist of 1,000,000*l.* divided into 100*l.* shares. In fact, shares to the amount of 500,000*l.* only had been taken, upon which calls had been paid to the extent of 25*l.* per share, and a partial payment made on another call of 10*l.* The Company's deed of settlement provided that the affairs should be managed by a Board of Directors, who should issue policies signed respectively by three directors (they being indemnified out of the funds), and should cause it to be stated in every policy that the subscribed capital of 1,000,000*l.*, and other the stocks, funds and property of the Company unapplied at the time of any claim or demand, should alone be liable to any claim under such policy ; that the directors signing, or any of them, should not be responsible to the assured beyond the funds &c. in their hands or power at the time of recovery on the policy ; and that no proprietor should in any event be liable beyond the amount unpaid on his share. The deed further provided that any proprietor sued in respect of any policy might give notice to the Board, and they might take the defence upon themselves, indemnifying such proprietor ; and, if they should not do so, and the proprietor should be compelled to pay the debt, and should not be reimbursed by the directors, provision was made for enabling him to recover the debt and costs against the proprietors individually.

The policy in question was in the form always adopted by the Company. It was headed "*M. Assurance Company.* Capital, one million ;" and was executed by three directors, who were stated therein to sign in witness of the

premises and that the Company were content with the assurance. Defendant *J. G.* was a director, but did not sign. The policy was as set forth in the declaration, with clauses limiting responsibility to the capital and funds of the Company, and exempting individual shareholders, except to the amount of their respective shares, but omitting the stipulation directed by the deed, that the directors signing should not be liable beyond the funds in their hands. Evidence was given for the defendant that the Company had not, when the cause of action accrued, or afterwards, "any moneys, property or available funds whatever in their hands" wherewith they could have satisfied plaintiff's claim.

The Judge ruled that the matters proved were evidence on which the jury would be justified in finding for the plaintiff on both issues : and that the Company had available capital stock and funds while a portion of the capital stock sufficient to pay the plaintiff remained uncalled for.

Held by the Court of Exchequer Chamber, affirming the judgment in Q. B.,

That the first count was good on general demurrer, inasmuch as it is expressly stated a joint contract made by the defendants, which might be enforced by law. *Platt* B. dubitante.

That the count was also good on special demurrer, being sufficiently certain.

That the third defendant's plea, founded on stat. 35 G. 3. c. 63., was bad on general demurrer.

Judgment was also affirmed on the plea of the fourth defendant.

Held, further, in the Court of Exchequer Chamber, on the bill of exceptions :

By *Talfourd* J., and *Parke, Alderson, Platt and Martin* Bs.; That there was no evidence of a joint contract by the defendants.

By *Cresswell* and *Williams* Js.; That there was evidence of such joint contract, and of a sufficiency of capital stock and funds. And, by *Cresswell* J., that the clause in the deed of set-

tlement, exempting every proprietor from liability beyond his own unpaid subscription, was either insensible or void as being repugnant to the rest of the deed.

Sembler, by Talfourd J. and Platt B., and held by *Martin B.*, that there was evidence of a several contract by each defendant with the assured to the amount unpaid on such defendant's shares.

Quære, per Parke and Alderson Bs., whether the policy, not being conformable to the power vested in the directors by the deed of settlement, was binding on the defendants.

A *venire de novo* was awarded. *Hallett v. Dowdall*, 2.

II. Policy: subscription.

By a director of a company who is not individually named in the policy, 2. *Ante, I.*

III. Policy: conformability to powers.

Effect of policy not being conformable, 2. *Ante, I.*

IV. Limitations of liability.

1. To subscribed capital of insuring company, 2. *Ante, I.*

2. To funds available in the hands of the directors, 2. *Ante, I.*

3. Of shareholder, to amount of his shares, 2. *Ante, I.*

4. Repugnancy, 2. *Ante, I.*

V. Pleading.

1. What declaration shows a joint contract, 2. *Ante, I.*

2. Declaration when sufficiently certain, 2. *Ante, I.*

3. Argumentative denial of subscription, 2. *Ante, I.*

VI. Evidence.

1. Of joint contract by shareholders of insuring company, 2. *Ante, I.*

2. Of several contract by each shareholder to the amount of his shares, 2. *Ante, I.*

3. Of sufficiency of capital, 2. *Ante, I.*

ATTESTATION.

Of warrant of attorney, 789. *Application.*

ATTORNEY.

I. Signature of documents by.

Notice of application for certiorari, 416. *Certiorari, I.*

II. Attestation by.

Of warrant of attorney, 789. *Application.*

III. Contracts by.

1. What not his own contract but that of his client, 503. *Agent, II. 1.*

2. Liability incurred by acting without authority, 503. *Agent, II. 1.*

IV. Attendance by.

When not on proceeding before Vice Chancellor of University, 647. *University, I.*

V. Warrant of attorney. *Warrant of attorney.*

AUDITOR.

I. Poor law auditor, 682. *Poor, V. 1.*

II. Of an estate, 425. *Appportionment.*

AUTORITY.

Liability incurred by persons acting as agents without authority, 503. *Agent, II. 1.*

BAILMENT.

I. Liabilities of the same nature as those of a bailee.

Treasurer of a building society, 277. *Building Society, I.*

BARON AND FEME.

I. Living apart: habeas corpus.

Where a wife is, by her own desire, living apart from her husband, and is under no restraint, the Court will not grant a habeas corpus on the application of the husband, for the purpose of restoring her to his custody. *Regina v. Leggatt*, 781.

II. Competency as witnesses.

Stat. 14 & 15 Vict. c. 99. does not remove the objection to admitting as a witness the wife of a party to the record. So held by Lord *Campbell* C. J. *Wightman* and *Crompton* Js.; *Erle* J. dissentient. *Stapleton v. Crofts*, 367.

III. Wife's incapacities.

Her incapacity to take case out of statute of limitations by payment of interest, 262. *Bills*, II.

IV. Pleading.

Joinder of wife where husband's payment of interest has taken case out of statute of limitations, 262. *Bills*, II.

BEER.

Licence to sell beer by retail.

I. The granting not revised on certiorari.

The resident holder and occupier of a house annually rated at above 15*l.* in a town corporate with a population of more than 5000, called upon the overseers for certificates to enable him to apply, under stat. 3 & 4 Vict. c. 61., for a licence to sell beer by retail. The overseers gave him a certificate of the amount at which the house was rated, and attached their certificate, as directed by stat. 4 & 5 W. 4. c. 85., to the certificate of character produced by him; but refused to certify that he was the resident holder and occupier of the house. The Board of Inland Revenue, being satisfied, on

inquiry, that he was the resident owner and occupier, directed their officers to grant a licence.

Held, on motion to quash the licence, which had been brought up by certiorari, that the granting of the licence was not a judicial act capable of revision by the Court on certiorari. *Seemle* that the proper mode of trying its validity was to treat it as void. *Regina v. Salford, Overseers*, 687.

II. Validity how to be tried, 687. *Ante*, I.

BELIEF.

Of charge of felony: pleading, 378. *Imprisonment*.

BENEFIT SOCIETY.

See *Loan Society*. *Building Society*.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. What is a bill or note.

Instrument in ambiguous form.

An instrument was drawn in the following form: "Two months after date I promise to pay to T. R. L." (plaintiff) "or order 99*l.* 15*s.*"

"H. Oliver."

Underneath was written, on the left hand of the instrument, "J. E. Oliver" (defendant). Across it was written "accepted, payable S. & Co., Bankers, London. E. Oliver." "E. Oliver" was signed by defendant.

Held, that the instrument might be sued upon as a bill of exchange drawn by *H. Oliver* upon and accepted by, defendant.

Per Lord *Campbell* C. J. Such an instrument would be good as a bill of exchange, as against the drawer, even before acceptance. *Lloyd v. Oliver*, 471.

II. Note made by wife before coverture.

Effect of payment of interest by wife after marriage with money sent by joint maker.

Declaration against husband and wife, upon a joint and several promis-

Held, on demurrer, a bad plea.
Goodwin v. Cremer, 757.

VIII. Pleading and evidence.

1. Count on an account stated, where the instrument itself cannot be read in evidence, 252. *Account Stated*, I.
2. Plea : Note given to buy off opposition in Insolvent Court, and discharge by that court: duplicity, 443. *Ante*, IV.
3. Plea of payment pendente lite by another party liable, 757. *Ante*, VII.

IX. Cheques. *Cheque*.

BOARD OF INLAND REVENUE.

Granting of beerhouse licenses, 687.
Beer, I.

BOND.

I. Condition.

The liability of the obligor when that of a surety only.

Declaration, on the obligatory part only, upon two bonds, dated in 1828 and 1839 respectively.

Pleas : 3. That the alleged causes of action did not accrue within twenty years. 4. That after the making of the bonds, and before the commencement of the action, defendant became bankrupt, and that the said causes of action accrued before such bankruptcy. Replication, joining issue on the fourth plea, and, to the third plea, that the said causes of action did accrue within twenty years. Issue thereon.

The plaintiff then (by enrolment on the record) set out the bonds and the conditions. The first bond stated that *J. Mather* and defendant bound themselves, and each of them, by himself, his heirs &c., to the plaintiff in the sum of 300*l.* The condition (after reciting that the said *J. M.* had agreed with plaintiff for the sale to him, for 150*l.*, of an annuity of 20*l.* to be paid to plaintiff, his executors &c., during the joint and several lives of plaintiff and his wife, and the survivor; that *J. M.* had requested defendant to join in and execute the bond, which he had agreed to do, for

securing the regular payment of the annuity; and that the 150*l.* had been paid to *J. M.*) was for payment of the annuity, by *J. M.* or defendant, or their or either of their heirs &c., some or one of them, by equal half yearly payments on &c., during the joint and several lives of plaintiff and his wife, and of the survivor, and a proportionate part in case of the survivor dying between the days of payment. The second bond and condition were similarly framed for the payment, by and to the same parties, of an annuity of 10*l.* The plaintiff then suggested that, in 1851, two and a half years' arrears were due in respect of each annuity, and were still unpaid.

At the trial, it appeared that the defendant had become bankrupt in 1836; that *J. M.* had paid the annuities half yearly down to 1848, but never till after the day of payment fixed by the condition, so that there had been breaches of the condition twenty years before action and before the bankruptcy; and that the arrears suggested by plaintiff were still due. Plaintiff had not attempted to prove as annuity creditor under defendant's bankruptcy.

Held, that a new cause of action arose upon each successive breach of the condition; that, on the record as it stood, plaintiff was entitled to prove at the trial, breaches within twenty years; and that, on such proof, he was entitled to a verdict upon the issue on the Statute of Limitations.

Held, further, by Lord *Campbell* C. J. and *Erle* J., dissentient *Wightman* J., that defendant's liability under the bonds and conditions was that of a surety only; that *J. M.* was the principal, and grantor of the annuity: that plaintiff, therefore, could not have proved, under defendant's bankruptcy, in respect either of the penalties or of the breaches of condition committed before the bankruptcy; and that consequently the matter pleaded and proved was no bar to the action. *Amott v. Holden*, 593.

II. Statute of Limitations.

New causes of action on successive breaches, 593. *Ante*, I.

A foot bridge, formed of three planks, nine or ten feet long, and a hand rail, and which carried a public footpath across a small stream, was held not to be repairable as a county bridge, though it had been repaired by the commissioners under the above mentioned local Act. *Regina v. Southampton, County*, 841.

2. Effect of enactment that bridges heretofore repaired by parishes &c. shall be repaired as bridges called county bridges have usually been repaired, 841. *Ante*, I.

II. Liability of county to repair: what bridges.

1. An enlarged bridge at a different point, 841. *Ante*, I. 1.
2. Not a footbridge, 841. *Ante*, I. 1.

III. Statute 43 G. 3. c. 59.

Effect of non-compliance with provisions, 841. *Ante*, I. 1.

BUILDING SOCIETY.

I. Treasurer.

When not responsible for moneys taken from him by *vis major*.

The treasurer of a Benefit Building Society within stats. 6 & 7 W. 4. c. 32. and 10 G. 4. c. 56., having covenanted with the Society's trustees that he will faithfully discharge the duties of treasurer, duly obey the directions of the trustees in relation to such duties, and punctually account to the trustees for all and every sum and sums of money, bills, notes, securities, goods and chattels, which he, in his office of treasurer, shall receive on the Society's account, and being bound by the rules of the Society, to pay over in a given time *the same* moneys which he shall receive, does not violate *such* obligation if, after receiving moneys, and before he has an opportunity of paying them over, he is robbed of them by irresistible violence and without fault of his own; such obligation being that only of a bailee.

So held in an action by trustees of such Society against sureties of a trea-

surer, complaining that he had not paid *the said* moneys, to which the sureties pleaded such robbery, committed upon their principal, in excuse of his nonpayment. *Walker v. British Guarantee Association*, 277.

II. Nature of his obligation as to money, 277. *Ante*, I.

CANAL.

I. Use of water by riparian proprietors.

1. What easements a company can neither grant nor become subject to by permissive user.

A company was established, by stat. 34 G. 3. c. 78., for making and maintaining a certain navigable canal; and, by sect. 113, reciting that the erection of steam engines near to the navigation might promote its interests, it was made lawful for the owners of lands within twenty yards of the canal to draw off water sufficient to supply such engines *for the sole purpose of condensing the steam* used for working them; such water to be returned into the canal (allowing for inevitable waste), so that no obstruction should arise to the navigation.

The Company sued *R.* in case, for that he, being possessed of land within twenty yards of the canal, and of a mill and steam engine on such land, drew water from the canal more than sufficient for the sole purpose of condensing &c., and used the same for other purposes than that of condensing &c., whereby plaintiffs lost and were deprived of the water. Plea, that defendant was tenant of land situate &c. and abutting &c., and was the occupier of *a certain mill* erected on the said land and abutting on the canal, and of a certain steam engine in the said mill, being the land, mill and engine mentioned in the declaration: and that defendant and all occupiers of the said land, mill and engine had for twenty years used as of right &c. the easement of drawing from time to time from the canal such quantities of water as were necessary, for other purposes than that of con-

CERTIORARI.

I. To remove order of sessions: notice to what justices.

To interested justice whose interference is the act complained of.

During the trial of an appeal against an order of removal, at the County Quarter Sessions, which was confirmed with costs, *F. S.*, one of the magistrates for the county, and a rated inhabitant of the appellant parish, sat on the bench, and on several occasions spoke to the chairman, and referred to documents put in evidence. The presence of *F. S.* being objected to, on the ground that he was an interested party, he admitted the fact; and the chairman stated that *F. S.* would take no part in the proceedings: but he remained in court till the decision of the appeal. No further objection was made. On motion for a certiorari, *F. S.* stated, on affidavit, that, although he did speak to the chairman, and refer to documents, during the trial, he did not vote or give any opinion on the question before the court, or influence the decision of the other magistrates; and that, if the chairman and he had not believed that his presence on the bench, after his statement that he would not interfere, had been acquiesced in, he would have retired from the court during the trial.

Held, that his presence, under those circumstances, rendered the proceedings invalid.

The notice of application for a certiorari, under stat. 13 G. 2. c. 18. s. 5., was sworn to have been served on *F. S.* and another justice "who were present at the Sessions" "when the appeal mentioned in the said notice was heard, and were and are two of the justices" "by and before whom the order of Sessions mentioned in the said notice was made." The notice was signed by *J. M.*, "attorney for the inhabitants of" the respondent parish.

Held: 1. That the service was sufficient, inasmuch as *F. S.*, under

the circumstances, must be considered as a member of the court, and one of the justices who made the order:

2. That the signature was sufficient. *Regina v. Suffolk Justices*, 416.

II. To remove order of sessions: on what ground.

Interference of interested justice, 416.
Ante, I. 421, *Appeal*, VI. 2.

III. To remove order of sessions: signature of notice.

By "attorney for the inhabitants of," &c., 416. *Ante*, I.

IV. To remove indictments.

What judge may order procedendo, and how.

A Judge of any of the three superior common law Courts has jurisdiction to make an order for the issuing of a procedendo, to send back proceedings on an indictment for felony, removed by certiorari from an inferior Court: and it rests in his discretion whether such order should be made upon a summons to shew cause, or immediately. *Regina v. Scaife*, 773.

V. Procedendo.

1. By what judge, 773. *Ante*, IV.
2. Whether with or without previous summons, 773. *Ante*, IV.

VI. What proceedings not revised on certiorari.

Granting of beerhouse licence, 687.
Beer, I.

CHAMBERS.

Judge at Chambers. *Judge*.

CHANCELLOR OF THE DUCHY OF LANCASTER.

Finality of decision removing a county court judge, 173. *County Court*, I. I.

CHEQUE.

Post dated.

Effect of promising to pay the amount without naming it, 252. *Account Stated*, I.

CHOSE IN ACTION.

Bequest of, 878. *Bills*, V. 1.

CHURCH DISCIPLINE.

I. Submission to sentence under stat. 3 & 4 Vict. c. 86. s. 6.

Sentence requiring certificates of good behaviour before suspension is taken off.

Where a beneficed clergyman charged with an offence by report of Commissioners under sect. 5 of the Church Discipline Act, 3 & 4 Vict. c. 86., consents, under sect. 6, to abide the judgment of the Bishop without further proceedings, and is thereupon sentenced to suspension from the functions and emoluments of his office for a term of years, the Bishop may lawfully make it a part of such sentence that, when the term expires, the suspended party shall produce a certificate of his good behaviour during such term, under the hands of three beneficed clergymen in his vicinity, such certificate to be approved of by the Bishop before the suspension be taken off; and that the suspension shall continue, notwithstanding the expiration of the term, until such approval. *Ex parte Rose*, 751.

II. Jurisdiction as regards judgment and sentence.

Requirement of certificates of good behaviour on expiration of term of suspension, 751. *Ante*, I.

CLERGYMAN.

Church discipline, 751. *Church Discipline*, I.

CLERICAL ERROR.

How dealt with. *Regina v. Williams*, 393.

CLERK.

To trustees of turnpike road, 316. *Highway*, XI. 1.

CODICIL.

Revocation of devise by.

Rule as to its operation, 197. *Devise*, I. 1.

COLLEGE.

See *University*.

COMMISSION.

To examine witnesses abroad, 490. *Witness*, I. 1.

COMMISSIONERS.

I. Generally.

What is not an acting as a commissioner, 831. *Agent*, I. 1.

II. Under an act by which certain persons or their agents are to be commissioners.

1. How and for how long such agents may be appointed, 831. *Agent*, I. 1.
2. Who need not make previous declaration, 831. *Agent*, I. 1.
3. Authority of agents on becoming commissioners, 831. *Agent*, I. 1.
4. What the agents need not show on the face of their proceedings, 831. *Agent*, I. 1.

III. Tithe Commissioners. *Tithe*.

IV. Paving Commissioners, 705. *Occupation*.

COMMUTATION.

Of Tithe. *Tithe*.

COMPANIES CLAUSES ACT.

See *Statute.*

COMPANY.

I. Deed of settlement.

1. Validity of rule for forfeiture of share in case of nonexecution of deed.

In the deed of settlement of a joint stock Company regulated by stat. 7 & 8 Vict. c. 110., it may lawfully be made a rule that the share of any subscriber for part of the Company's capital, who shall not execute the deed within three months from its date, shall be forfeited if the directors think fit. Although no provision be made for giving the subscriber notice to execute, or notice of intention to enforce the forfeiture. And a subscriber whose shares have been declared forfeit under the rule, without any such notice, cannot maintain an action against the Company for refusing to give him certificates of his holding such shares.

It is no answer to such action that the refusal was not authorized by the Company under their seal.

Although, by stat. 7 & 8 Vict. c. 110. s. 3., a shareholder in such Company is a person who has executed the deed of settlement or a deed referring to it, the plaintiff, in an action against the Company for not permitting him to execute, need not aver that he was denied permission to execute a deed so referring: it is enough to state that he was not allowed to execute the deed. *Stewart v. Anglo Californian Gold Mining Company*, 736.

2. Effect of qualified execution, 728. *Post*, III. 1.
3. Pleading: averment of refusal to permit execution, 736. *Ante*, 1.
4. Execution of deed referring to deed of settlement, 736, 742. *Ante*, 1.

II. Joint stock company: registration.

1. What society does not require it, not being for any purpose of profit: loan societies.

A Society consisting of more than twenty five shareholders raised a fund by monthly subscriptions from each shareholder, out of which sums were occasionally advanced by way of loan, at 5 per cent. interest, to the highest bidder among the shareholders; the advance not to be less than 20*s.*, nor more than the amount subscribed for by him. The additional subscription paid by such highest bidder for the preference of having the loan was payable by monthly instalments; and fines were incurred in default of payment: the fines and monthly instalments, and the interest upon the loans, being added to the general fund of the Society. The repayment of the loans was secured to the Society in the names of three trustees.

Held, that the Society was not a joint stock company established "for any purpose of profit," within stat. 7 & 8 Vict. c. 110. s. 2, and might therefore make the loans in question without having obtained a certificate of complete registration. *Bear v. Bromley*, 271.

2. Profit and loss in transactions subsidiary to the general purpose, 271. *Ante*, 1.

III. Registered joint stock company: certificates.

1. Execution of deed a condition precedent.

A person who has subscribed for shares in a joint stock Company, completely registered under stat. 7 & 8 Vict. c. 110., is not entitled to certificates under sect. 51 till he has executed the deed of settlement or a deed referring thereto.

To state in a declaration that plaintiff executed the deed of settlement, except as to a certain specified clause, is not equivalent to alleging that he executed the deed. *Wilkinson v. Anglo-Californian Gold Mining Company*, 728.

2. Refusal on the ground of forfeiture for nonexecution of deed, 736. *Ante*, I. 1.

COMPETENCY.

- Compensation when not payable unless company enters plaintiff's land.

A railway Company, promoting in Parliament a bill for the extension of their line, which extended line would pass through the lands of the plaintiff, covenanted with him as follows : "In the event of the bill hereinbefore mentioned being passed in the present session of Parliament, the said Company shall, *before they shall enter* upon any part of the lands of the said Sir T. R. G." (plaintiff), "pay to the said Sir T. R. G., his heirs or assigns, the sum of 4900*l.*, purchase money, for any portion of his lands, not exceeding 43 acres, which the said Company may, under the powers of their Act, require and take for the purposes of this undertaking. In addition to purchase money as aforesaid, the said Company shall pay to the said Sir T. R. G., his heirs or assigns *before they shall enter* upon any part of the said land, the sum of 7100*l.* as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding 43 acres, to be taken by them."

Held: 1. That the Company were not bound to pay either of these sums unless they entered upon some part of the plaintiff's lands.

2. That an absolute covenant by the Company to pay these sums to the plaintiff, in a reasonable time after the passing of the Act, would have been ultra vires, and void. *Gage v. Newmarket Railway Company*, 457.

2. Absolute covenant when ultra vires, 457. *Ante*, 1.

III. For death or injury caused by misfeasance.

Measure of damages, 93. *Death*, I.

COMPETENCY.

Of wife as a witness, 367. *Baron and Feme*, II.

COMPUTATION.

Of periods of enjoyment, 569. *Way*.

CONSIDERATION.

911

CONCURRENT JURISDICTION.

- Of Superior Court and County Court, 257. *Appeal*, I.
- Of Court and Judge at Chambers, 257. *Appeal*, I.

CONDITION.

- Generally.

How far powers to execute works are dependent on powers in the same act to make compensation, 531. *Compensation*, I.

- Precedent.

- To right of dismissal or claim for compensation, 425. *Apportionment*, 457. *Compensation*, II. 1.
- Provision of timber, as precedent to obligation to repair, 661. *Covenant*, I. 1.

- Precedent: Determination of referee.

On which party the burthen of shewing such a determination lies, 425. *Apportionment*.

- Mutual conditions: Pleading, 661. *Covenant*, I. 1.

- Readiness and willingness when sufficient, 661. *Covenant*, I. 1.

- Of bond.

- Successive causes of action by successive breaches, 593. *Bond*, I.
- Inrolment on the record, 593. *Bond*, I.

CONSENT.

- What is an order obtained by consent, 516. *Bankrupt*, II.
- Of counsel to course suggested by judge, 777. *Coste*, II.

CONSIDERATION.

- For repair of highway out of district, 761. *Statute*, III.
- Illegal, 443. *Bills*, IV.
- See also *Contract*, XII.

CONSTRUCTION.

I. Generally.

Subsequent declarations not admissible, 503. *Agent*, II. 1.

II. Of statutes.

1. Referring to title of act, 93, 109. *Death*. 316. *Highway*, XI. 1.

2. When not restricted by reference to title of act and preambles, 806. *Ejectment*.

3. Retrospective effect of limitation clause when not restricted.

Stat. 11 & 12 Vict. c. 43. (for regulation of proceedings before justices out of Sessions) enacts, by sect. 11, that, where a complaint shall be laid before a justice, on which he shall have authority to grant an order, such complaint shall be made within six calendar months from the time when the matter of complaint arose. By sect. 38, the Act is to commence and take effect seven weeks after its passing.

Held that a complaint, after the Act came into operation, upon matter which arose before, was barred by sect. 11, though six calendar months from the time when the matter of complaint arose had elapsed when the statute passed:

For, the Act having given time for preferring any such complaint before the limitation clause came into operation, no such injustice resulted from giving full effect to sect. 11 as would warrant the Court in putting upon it a restricted construction. *Regina v. Leeds and Bradford Railway Company*, 343.

4. Restriction to prevent inevitable injustice, 343. *Ante*, 3.

5. How affected by the time of act coming into operation being postponed, 343. *Ante*, III.

6. Power discretionary or obligatory, 490. *Witness*, I. 1.

7. As to implying a condition, 531. *Compensation*, I.

12. "In like manner as if the same were a warrant of removal," 361. *Poor*, XII.
13. "Person having the management of such road," 348. *Highway*, II. 1.
14. "Office," 425. *Apportionment*.
15. "No order," 257. *Appeal*, I.
16. "To go as ordered by my said will," 197. *Devise*, I. 1.
17. "The parties," 367. *Baron and Feme*, II.
18. For any purpose of profit," 271. *Company*, II. 1.
19. "Real estates," 474. *Devise*, II. I.
20. "Same stock," 560. *Contract*, XIII. 1.
21. "Sending," 388. *Poor*, IX.
22. "Signed with the name," 576. *Councillor*, I.
23. "Shareholder," 728, 736. *Company*. II. 1. III. 1.
24. "Holder of shares," 728, 736. *Company*. II. 1. III. 1.
25. "Subscriber," 728, 736. *Company*. II. 1. III. 1.
26. "During such time as," 526. *Councillor*, II.
27. "Touching the right to any tithes," 145. *Tithe*, I. 1.
28. "Vis major," 277. *Building Society*, I.
29. "Irresistible violence," 277. *Building Society*, I.
30. "Yearly," 496. *Landlord and Tenant*, II.

CONTINGENCY.

I. Contingent limitations.

1. Effect of one of several contingencies being illegal, 224. *Devise*, III. 1.

2. Necessity for happening of the contingency, 197. *Devise*, I. 1.
- II. Debt payable upon a contingency, 598. *Bond*, I.

CONTINGENT REMAINDER.

See *Devise*, III.

CONTRACT.

I. Illegality.

1. Contravention of public policy.

The *South Eastern Railway Company* was incorporated for the purpose of making and maintaining that railway, with power to raise moneys for the purposes of the Act. The projectors of an intended *Dover & Deal* &c. railway had contemplated bringing a bill before Parliament for the establishment of such railway, but were in doubt as to proceeding. *M.*, a person interested, and having influence, in the *South Eastern Company*, undertook that, if the projectors of the *Dover &c. Railway* would proceed in endeavouring to obtain their Act, and, if successful, would hand over their scheme to the *South Eastern Company*, that Company, if the bill were rejected, would insure them against loss by such rejection, and would pay their Parliamentary expenses. No clause in the Company's act empowered them so to apply their funds. The bill was proceeded with, and rejected by Parliament. In an action against *M.* on the above contract, the declaration alleging that the *South Eastern Company* did not insure &c. and did not pay the Parliamentary expenses.

Held, by the court of Exchequer Chamber on Error, that the stipulation by *M.* was a promise that the Company should do an act which was illegal and contravened public policy and a public statute, and that an action did not lie against *M.* upon such promise: and judgment, which had been given for the plaintiff below, was arrested by the Court of Error. *Macgregor v. Dover and Deal Railway Company*, 618.

CONTRACT.

2. Contravention of statute, 618. *Ante*, I.
3. Contract ultra vires, 618. *Ante*, I. 1. 457. *Compensation*, II. 1.
- II. When presumed or implied.
1. From occupation by a corporation or its agent, 632. *Corporation*, I. 1.
 2. From rescinding contract after part performance, 640. *Executors*, I. 1.
- III. Joint or several.
1. Subscription of policy by directors of a partnership, 2. *Assurance*, I.
 2. Contract limiting liability of shareholders, 2. *Assurance*, I.
- IV. Parties.
1. Clerk on behalf of trustees of turnpike road, 316. *Highway*, XI. 1.
 2. Attorney, when held not to have contracted himself, 503. *Agent*, II. 1.
 3. Members of town council, 526. *Councillor*, II.
 4. Railway Company, 618. *Ante*, I. 1. 632. *Corporation*, I. 1.
- V. Liability to stamp duty.
- Exemption as relating to sale of goods: transfer of debt.
- Defendant was indebted to plaintiff in 47*l.*; and *C. & W.* were indebted to defendant in 48*l.* By agreement between *C. & W.*, plaintiff and defendant, the following document was delivered to plaintiff: "To Messrs. *C. & W.* I request you will supply Mr. *C.*" (plaintiff) "with such parcels of Roman cement as he shall require, to the amount of 48*l.*, and charge to the account standing with you to my credit. *R. C.*" (defendant). Under this was written: "To Mr. *C.*" (plaintiff). "On the consideration above named we agree to supply to your order, when you shall require it, Roman cement to the amount of 48*l.* *C. & W.*" Held, that this was an agreement relating to the sale of goods within the exemption in Schedule Part I to stat. 55 G. 3. c. 184., and therefore did not require a stamp. *Chatfield v. Cox*, 321.
- VI. Necessity for seal.
1. When not valid for want of seal may nevertheless disqualify, 526. *Councillor*, II.
 2. Use and occupation by corporation, 632. *Corporation*, I. 1.
- VII. Instruments constituting the contract.
- Invoices when not, 560, 566. *Post*, XIII. 1.
- VIII. Executed or Executory.
- Distinction as regards corporations, 632, 636. *Corporation*, I.
- IX. Continuing contract.
- Effect as a disqualification, 526. *Councillor*, II.
- X. Entireness.
1. Contract for hauling and carriage; cause of action when and where complete, 785. *County Court*. II.
 2. Effect of death and rescinding after part performance, 640. *Executors*, I. 1.
- XI. Rescinding.
1. Effect of rescinding contract after part performance, 640. *Executors*, I. 1.
 2. Does not put an end to contract ab initio, 640. *Executors*, I. 1.
- XII. Consideration : failure of consideration.
- Dishonour of notes in which a deposit is made, 722. *Bank*, 1.
- XIII. Warranties.
1. What description in a sold note constitutes a warranty.
- Defendant, by his agent, sold plaintiffs a parcel of turnip seed, and gave

the following sold note: "Mr. T. C. R." [defendant's agent]. "Sold to Messrs. B. & Co." [plaintiffs] "for Mr. C. L." [defendant], "14 quarters *Skirving's Swedes*, at 17s. per bushel." Defendant's agent afterwards sold plaintiffs a second parcel of turnip seed, stating that it was "of the same stock" as the first parcel. No sold note was given; the invoices described it as "24½ quarters of turnips."

Held: As to the first parcel, that the jury was properly directed that the description of it in the sold note amounted to a warranty that it was *Skirving's Swedes*.

As to the second parcel, that the statement of defendant's agent that it was "of the same stock" as the first, on the subsequent sale to plaintiffs, was evidence for the jury of a warranty that the second parcel also was *Skirving's Swedes*. *Allan v. Luke*, 560.

2. What reference to former sale evidence of a warranty, 560. *Ante*, I.

XIV. Powers of revocation and determination.

If subject to approval, who must shew the approval, 425. *Apportionment*.

XV. Stipulation that a matter shall be determined by a referee.

Burthen of shewing such a determination, 425. *Apportionment*.

XVI. Construction.

Subsequent letters when not admissible in construing contract contained in a former letter, 503. *Agent*, II. 1.

XVII. Death.

Effect on entire contract, after part performance, 640. *Executors*, I. 1.

XVIII. Disqualification by.

1. When a disqualification arising de die in diem, 526. *Councillor*, II.

2. Effect of invalidity from want of seal, 526. *Councillor*, II.

CONTRIBUTION.

Of proportion of tithe commutation rent charge, 393. *Adjudication*.

CONVENTION.

With *France* as to fisheries, 882. *Action*, I. 1.

CONVICTION.

For felony.

Forfeiture of choses in action, 878. *Bills*, V. 1.

CORPORATION.

I. Acts of and contracts by : seal.

1. Use and occupation without contract under seal.

Where any corporation has actually used and occupied land, for a corporate purpose, by permission of the owner, it is liable in assumpsit for use and occupation, though there be no contract under seal for such occupation.

Where the corporation so occupying is a railway company, within the provision of stat. 8 & 9 Vict. c. 16., Companies Clauses Consolidation Act, 1845, sect. 97, that any contract which, if made between private persons, would be valid though made by parol only, may be made by parol on behalf of the company by the directors, and shall bind the company, such parol contract may be presumed against the company in an action for use and occupation, in the absence of direct evidence to the contrary, upon proof of actual occupation by the corporation or its agent. *Lowe v. London and North Western Railway Company*, 632.

2. Effect of contract not under seal as creating a disqualifying interest, 526. *Councillor*, II.

3. Distinction between executed and executory contracts, 632, 636. *Ante*, I.

COSTS.

4. Liability for wrongful acts of servants without formal authority, 736, 742. *Company, I. I.*

II. Municipal. *Municipal Corporation.*

COSTS.

I. Of witnesses.

Maintenance of party examined in his own behalf.

If a party to a cause be examined on his own behalf under stat. 14 & 15 Vict. c. 99. s. 2., the Master may allow, in taxation, for his maintenance during the time of his detention for the purpose of giving evidence, as in the case of any witness, if his testimony, in the Master's opinion, was material and necessary, and if he attended for the purpose of being examined as a witness and not merely to superintend the cause. *Howes v. Barber*, 588.

II. Of first trial.

Where jury were discharged.

Where the judge trying a cause discharges the jury because they cannot agree upon their verdict, and a second trial is had, the party who then succeeds is not entitled to costs of the first trial.

And it makes no difference that counsel on both sides, upon conference, assented to the jury being discharged, when the Judge, but for such assent, would have detained them longer. *Bostock v. North Staffordshire Railway Company*, 777.

III. Of action in superior Court in cases of concurrent jurisdiction with county court, 257. *Appeal, I.*

IV. Pleading so as to include.

Plea of payment pendente lite by prior indorser, 757. *Bills, VII.*

V. In criminal cases.

1. On criminal information. *Criminal Information.*
2. Defendant's right to costs, when limited to amount of prosecutor's recognizance, 703. *Criminal Information.*

COUNTY.

COUNCILLOR.

I. Election: signature and place of registry of voter.

Under stat. 5 & 6 W. 4. c. 76. s. 32., which requires the voting paper at an election of borough councillors to be signed with the name of the burgess voting, the party's usual signature is sufficient; and it is no valid objection that the Christian name is denoted only by an initial.

Such paper is correct according to sect. 32, if the place in respect of which the party votes, and for which he appears to be rated on the burgess roll, be described according to its actual situation, though the description may vary in terms from that on the burgess roll. *Regina v. Avery*, 576.

II. Of borough: disqualifying interest: time of applying for quo warranto.

Under stat. 5 & 6 W. 4. c. 76. s. 28., which provides that no person shall be qualified to be elected councillor of a borough "during such time as" he has any share or interest in any contract with, or employment by or on behalf of, the council, a person who has entered into a contract with the council, and been employed by them in respect of such contract, is disqualified from holding the office, though such contract required the corporation seal, and is not sealed.

While such contract continues, the disqualification caused by it arises de die in diem; and, during that time, a relator is not precluded, under stat. 7 W. 4 & 1 Vict. c. 78. s. 23., from applying for a quo warranto, though twelve calendar months have elapsed from the election of the party disqualified, or from the commencement of his disqualification. *Regina v. Francis*, 526.

COUNSEL.

Consent to discharge of jury, 777. *Costs, II.*

COUNTY.

I. Liabilities.

1. Liability to repair bridges, 841. *Bridge*, I. 1.
2. Liability to expense of pauper lunatics, 553. *Poor*, XIII.

II. County rate.

Effect of conventional arrangements by justices at Quarter Sessions, 841. *Bridge*, I. 1.

III. Sessions.

Appellate jurisdiction, 361. *Poor*, XII.

COUNTY COURT.

I. County court judge: removal for inability and misbehaviour.

1. Rule for quo warranto against successor when refused.

Application was made for a quo warranto against a county court judge, on the relation of a person who had held the office immediately before him, and who had been removed for inability and misbehaviour by the Chancellor of the Duchy of Lancaster, under stat. 9 & 10 Vict. c. 95. s. 18.

It appeared that, on a memorial addressed to the Chancellor, charging the relator with general misbehaviour, and particularizing one instance more strongly, and praying for his dismissal, the Chancellor had held an inquiry, which was attended by the relator and his counsel, and had heard evidence on the charges, not on oath or affirmation, and, within a few days after the close of the inquiry, had dismissed the relator by an instrument finding inability and misbehaviour, but not specifying any particular instance. Affidavits denying the inability and misbehaviour in the cases adduced on the inquiry, and generally, were put in.

This Court refused the rule, it not appearing that the relator had not been fully heard, or that the charges, if true, did not shew inability and misbehaviour; and the decision of the Chancellor being therefore final. And the Court held it not necessary that, after the inquiry had closed, a fresh

notice to the relator should have been given, to shew cause against his being dismissed. *Ex parte Ramshay*, 173.

2. Proceedings with a view to removal, 173. *Ante*, I.
3. Finality of decision, 173. *Ante*, I.

II. Jurisdiction: cause of action when and where complete.

On contract for hauling and carriage of goods.

Plaintiff, a carrier and wharfinger at *Swindon*, agreed in writing with defendant, living in *Surrey*, to carry his timber by barge to *London*, at 16s. per ton, including all charges but wharfage. It was necessary to haul the timber from the place where it lay to the wharf; and plaintiff provided horses for the purpose when defendant's horses were absent. Plaintiff sued in the *Swindon* county court for the balance of his account for the carriage, including a separate charge for hauling.

Held, on motion for a prohibition, that the hauling and the carriage formed one cause of action; that such cause of action was not complete until the timber was delivered in *London*; and that therefore the judge of the county court had not jurisdiction under stat. 9 & 10 Vict. c. 95. s. 60. *Barnes v. Marshall*, 785.

III. Costs of action in superior court: concurrent jurisdiction.

Application to judge or court: appeal from decision of judge, 257. *Appeal*, I.

COURT.

Jurisdiction.

When not ousted by covenant to refer, 425. *Apportionment*.

COVENANT.

I. What runs with the land.

1. Covenant to repair, though assignee not named.

Declaration in covenant, by lessor against assignee of lessee, set forth a covenant by lessee, for himself,

COUNTY.

his heirs, executors, administrators and assigns, that he and they would take the premises, from &c., for fourteen years, and would pay the rent; and that lessee, his executors and administrators, would, at his and their own cost, repair and put into tenable repair the demised premises, he, the lessee, having been already paid by lessor 400*l.*, the valued amount of the then present dilapidations exclusive of rough timber, but not on the stem, which was to be allowed by lessor, his heirs and assigns, on the demised premises: and that, after the premises should have been put into such repair, lessee, his executors, administrators and assigns, would, at his and their proper cost, from time to time repair and keep in tenable repair the demised premises, being allowed rough timber but not on the stem, upon the demised premises; the timber to be fetched and carried at the expense of lessee, his executors, administrators and assigns: and the said premises so repaired and kept, together with the possession of the said premises, should yield up to lessor at the expiration of the said term: and should not cross crop the land, nor commit any waste, &c., but should cultivate the land in a good husbandlike manner and according to the custom of the country. The count then averred entry of the lessee, and assignment by him to defendant, who entered, and was possessed until the expiration of the term.

Breach; That, although lessor, from the time of making the lease till the assignment, was ready and willing at all times to provide for lessee, and, from the assignment till the expiration of the term, was ready and willing to provide for defendant and lessee, on the demised premises, sufficient rough timber, not on the stem, to enable them to repair and put into tenable repair the said premises, and although lessee did not before the assignment or at any time repair or put into repair the said premises: yet defendant did not after the said assignment repair or put into repair the said premises, nor yield up the same well repaired at the expiration of the term, but suffered them to be ruinous &c. for

want of repair, and so left them at the expiration of the term. Also that defendant, after the assignment, cross-cropped the land and did waste, and used and cultivated the land in a bad and unhusbandlike manner, and not according to the custom of the country.

Defendant pleaded, among other pleas, as to suffering the premises to be ruinous and out of repair, and so leaving them: That lessor did not at any time from the assignment till the expiration of the term provide on the premises sufficient rough timber, not on the stem, to enable defendant to repair, nor any rough timber whatever. And he demurred specially to the declaration. Plaintiff demurred to the plea.

Held that the declaration was good: For

1. The covenant to put in repair ran with the land, and bound the assignee, though the lessee, in this part of the deed, covenanted only for himself and his executors and administrators. And that the payment of 400*l.* to the lessee was no ground for construing this covenant as limited to him personally.

2. It was sufficient, on this record, to aver that the lessor was always ready and willing to furnish timber, without stating that he actually did furnish it.

3. A covenant to yield up in repair at the end of a term runs with the land and binds an assignee, though not named.

4. Breach of a covenant to cultivate according to the custom of the country is sufficiently averred by stating that defendant did not so cultivate, without specifying instances.

Held also that the plea was bad, for that the condition precedent to the defendant's obligation to repair was sufficiently performed if he was ready and willing to supply timber when required. *Martyn v. Clue*, 661.

2. Covenant to yield up in repair though assignee not named, 661.
Anle, 1.

II. With a view to passing of an act of Parliament.

1. Absolute covenant for compensation when ultra vires, 457. *Compensation*, II. 1.

2. What imports the necessity for some entry, 457. *Compensation*, II. 1.

III. For employment and service.

Stipulations as to pension on revocation or resignation: burthen of shewing adequate cause, 425. *Apportionment*.

IV. Prospective covenant for reference.

1. When it does not oust Court of jurisdiction, 425. *Apportionment*.

2. Burthen of shewing judgment of referee, 425. *Apportionment*.

V. Pleading.

Breach of covenant to cultivate according to custom of country, 661. *Ante*, I. 1.

COVERTURE.

See *Baron and Feme*.

CRIMINAL INFORMATION.

Costs to defendant.

Amount, and how recovered.

Under stat. 4 & 5 W. & M. c. 18. s. 2., a defendant in a criminal information which is not tried, or in which a verdict is given for the defendant, is entitled only to such an amount of costs as equals the amount of the prosecutor's recognizance.

Semble, That the proper mode of obtaining such costs is for the defendant to take out a side bar rule for taxing the whole costs; and, upon that being done, he is entitled to so much of them as equals the amount of the recognizance. *Regina v. Savile*, 703.

CRIMINAL LAW.

I. Offences by statute.

Effect of repeal pending prosecution, 761. *Statute*, III.

II. Certiorari.

Procedendo; by what judge, and how, 773. *Certiorari*, IV.

III. Appearance of defendant at the trial.

How secured by recognizance. *Reg. Gen.* 251.

IV. Costs to defendant.

1. When limited by prosecutor's recognizance, 703. *Criminal Information*.

2. Side bar rule to tax, 703. *Criminal Information*.

V. Criminal Information. *Criminal Information*.

CROWN.

Forfeiture of legacy for felony, 878. *Bills*, V. 1.

CULTIVATION.

Covenant as to: breach, 661. *Covenant*, I. 1.

DAMAGES.

I. Measure of.

Under stat. giving compensation for death by misfeasance, 93. *Death*, I.

II. Nominal.

When not recoverable on count for account stated, 252. *Account Stated*, I.

III. Pleading so as to cover damages.

Plea puis darrein continuance of payment by prior indorser, 757. *Bills*, VII.

DEATH.

I. By misfeasance: remedy under stat. 9 & 10 Vict. c. 93.

Measure of damages.

In an action, under stat. 9 & 10 Vict. c. 93., by the wife, husband, parent or child of a person killed by

misfeasance, the jury, in estimating damages, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only.

And, the Judge, in such a case, having left it in the option of the jury to give damages on all or any of these grounds, though intimating his opinion that there was no ascertainable damage on any ground but the last, a new trial was granted for misdirection.

Decisions of the *Scotch Courts* are received as authority here, if the law on which they turn be common to *England and Scotland*. *Blake v. Midland Railway Company*, 93.

II. Of contractor after part performance of entire contract, 640. *Executors*, I. 1.

DEBT.

I. What are mutual debts, 857. *Executors*, II.

II. Transfer of, 321. *Contract*, V.

DEBTOR.

I. Buying off opposition in Insolvent Court, 443. *Bills*, IV.

II. See also *Creditor*.

DECLARATION.

I. In pleading.

1. For injury occasioned by breach of fishery regulations, 882. *Action*, I. 1.

2. By administrator on contract by intestate rescinded after his death, 640. *Executors*, I. 1.

3. Against surety of treasurer of Building Society, 277. *Building Society*, I.

4. On agreement in case a railway bill pass to pay landowner a certain sum as compensation before entering his land, 457. *Compensation*, II. 1.

DESCRIPTION.

5. Against directors of nonregistered company on a policy of assurance, 2. *Assurance*, I.

6. In action against registered joint stock company for not delivering certificates for shares, 728, 736. *Company*, I. 1. III. 1.

7. In action against joint stock company for refusing to permit shareholder to execute deed of settlement, 736. *Company*, I. 1.

8. For taking water out of canal for purposes not authorised by statute, 287. *Canal*, I. 1.

9. In action for compensation to family of a person killed by misfeasance, 93. *Death*, I.

II. Previous to acting as a commissioner.

Who need not make it, and when, 831. *Agent*, I. 1.

DEED.

Execution.

1. Cannot be in part only, 728, 731. *Company*, III. 1.

2. Execution of deed referring to deed of settlement, 736, 742. *Company*, I. 1.

3. Action for refusal to permit execution, 736. *Company*, I. 1.

DELAY.

In making application to the Court, 257. *Appeal*, I.

DEMISE.

See *Landlord and Tenant*.

DEPOSIT.

Of notes of country bank, 722. *Bank*, I.

DESCRIPTION.

Of place of rating in voting paper, 576. *Councillor*, I.

DEVISE.

I. Alteration by codicil.

1. Revocation when only partial, the old limitations being merely postponed to the new ones.

Devise:

I give to my son, *J. D.*, during his natural life, nine freehold houses, &c.; and, from and after his decease, I give the said houses unto his children &c. (if sons, on their attaining the age of 23, if daughters, of 21), their heirs &c., as tenants in common; and, in case he has only one child, to such one child (on attaining age, as before), his or her heirs, &c. *And, in case all the children of my said son shall die under the age, &c. (as before), then I give the before mentioned premises to my daughters, S., A. and E. M., during their respective natural lives, in equal shares; and, upon the decease of my said three daughters, the share of each of them so dying unto her children &c., their heirs &c., or child, &c. (with provision as to age as before); and, in case of the death of any of my said daughters without having a son who shall attain &c. or a daughter who shall attain &c. (the specified ages), I give such share as such child or children would have had to the child or children of my other two daughters, in equal shares, their heirs &c.; and, if only one daughter leaves issue that shall attain &c., then the whole of the said premises to such issue, if more than one, in equal shares, as tenants in common &c., their heirs, &c.; if only one, to such one &c.*

Codicil:

I hereby revoke that part of my will whereby I give nine freehold houses &c. to my son *J. D.* and his heirs, and my will is that my daughters *A.* and *E. M.* should enjoy them. I hereby give the said freehold houses to my said daughters *A.* and *E. M.* equally and jointly between them, and to the survivor of them, and, after their decease, to their child or children equally, and, if they should both die leaving no child or children, then the said freeholds to go as ordered by my

VOL. XVIII. N.S.

3 Q

said will. *A.* and *E. M.* died, leaving no issue. A son of *J. D.* and children of *S.*, the third sister, survived.

Held that the codicil did not entirely revoke the devise to *J. D.*, but only postponed him to the two sisters, *A.* and *E. M.*, and that, on the decease of both without issue, he, and not the children of *S.*, became entitled; and that, if the devise to *J. D.* had been revoked by the codicil, the children of *S.* could not take under the will, because the contingency on which she was to take according to the devise had not happened. *Doe dem. Evers v. Ward*, 197.

2. How far revocation shall operate, 197. *Ante*, 1.

II. What devise of realty shall pass leaseholds.

1. Reference to place under stat. 17 W. 4 & 1 Vict. c. 26. s. 26.

Testator, by his will, made in 1815, but confirmed by a codicil in 1841 (see stat. 1 Vict. c. 26. s. 34.), after directing payment of his debts and funeral and testamentary expenses, and giving certain annuities, with which he charged his real estate, and certain legacies, bequeathed "all the rest, residue and remainder" of his "personal estate, goods, and chattels, whatsoever and wheresoever," to his brother *M.* "absolutely, to and for his own use and benefit." He then devised as follows: "I give and devise all and singular my manors or lordships, rectories, advowsons, usages, lands, tenements, tithes and hereditaments, situate, lying, arising or being at or near" &c., in the county &c., "and a parcel of land purchased by me" of *M. L.* at &c., in the county, &c., "and all other my real estates in the said counties of" &c., "and elsewhere in Great Britain, and all my estate and interest therein," to trustees, to hold the same (subject to the said annuities) to the use of his said brother *M.* for life, remainder to the issue of the said *M.* in tail male; in default of such issue to *W. E.* and his heirs.

At the time of making his will, and at his decease, testator was possessed

DEVISE.

of freehold estates in both the said counties, and of lands held under certain church leases in one of them, which had been, according to the usual practice of the lessors, renewed every seven years. These leaseholds were distinct from, but near, and, in some places, contiguous to the freeholds; some of them were let and occupied with the freeholds, at undivided yearly rents. Cottages, ornamental and otherwise, were built upon part; and on part were buildings occupied by labourers employed upon the freehold estates.

Held, that under stat. 7 W. 4 & 1 Vict. c. 26. s. 26., the leasehold estates in question passed under the general devise of the realty, there being no contrary intention apparent on the will. *Wilson v. Eden*, 474.

2. What does not shew contrary intention, 474. *Ante*, I.

III. Limitation on contingency.

1. What executory devise in default of children attaining an age above that of twenty-one is void for remoteness.

D. (by will made before 1838) devised land to his daughter *E.* for her life, and, from and immediately after her decease, to such of her children as she might have, if a son or sons, who should live to the age of twenty three years, if a daughter or daughters, who should live to the age of twenty one years, and their heirs, as tenants in common: in case of the death of a son under twenty three or a daughter under twenty one, the share of such child to go to the surviving children attaining the ages named, and their heirs, as tenants in common; or, if only one should attain the age, to such child in fee: in case all the children of *E.* should die under the ages named, or if she should have none, then to *D.*'s daughter *A.* for life, and, upon her decease, to her children, if a son or sons, living to attain the age of twenty three years, if a daughter or daughters, living to the age of twenty one years, and their

heirs, as tenants in common; and, if only one child, to such child in fee: "And, further, in case of the death of" *A.* "without leaving a child, if a son, who shall live to attain the age of twenty three years, or, if a daughter, who shall live to attain the age of twenty one years" (not adding an express provision for the event of *A.* having no child), "I give the part and parts such children or child would be entitled to as aforesaid to *J.*" After *D.*'s death, *E.* died without having had a child; and afterwards *A.* died without having had a child.

Held, by the Court of Q. B., that the limitation over to *J.* might take effect as a contingent remainder upon *A.*'s death without leaving a child attaining the age named.

Held, by the Court of Exchequer Chamber, reversing this judgment, that the limitation over was not to be considered as expectant upon either event, of *A.* dying childless, or her dying without leaving a child that should attain the age, but upon the single event (however it might happen) of her dying without leaving a child that should attain the age, and was therefore an executory devise void for remoteness. *Doe dem. Evers v. Challis*, 224.

2. Limitation contingent on failure of a line of devisees how affected by revocation of the devise to that line, 197. *Ante*, I. 1.
3. What is a contingent remainder in default of children attaining a certain age, 224. *Ante*, I.

IV. Failure of children.

Limitation over when void for remoteness, 224. *Ante*, III. 1.

V. General principles of construction.

1. The devise must be legal as it would be read at the time of testator's death, 224. *Ante*, III. 1.
2. Onus of shewing intention, 474, 489. *Ante*, II. 1.
3. Effect of adding general words, 474. *Ante*, II. 1.

DIRECTION.

Effect of adding one to a promissory note, 471. *Bills*, I.

DISCHARGE.

Of jury who cannot agree, 777. *Costs*, II.

DISCOMMUNING.

See page 647. *University*, I.

DISCRETION.

Discretionary powers of Court.

1. To grant commission to examine a party on his own behalf, 490. *Witness*, I. 1.
2. As to requiring a previous summons, 773. *Certiorari*, IV.

DISHONOUR.

Of bank notes, 722. *Bank*, I.

DISQUALIFICATION.

Disqualifying interest, 526. *Councillor*, II.

DISSOLUTION.

Of railway company, 862. *Railway*, I. 1.

DIVISIBILITY.

Of issue.

On plea justifying the taking of water for several purposes, 287. *Canal*, I. 1.

DOCKS.

Principle of ascertaining rateable value of docks extending into several parishes, 325. *Poor*, I.

DUPLICITY.

In pleading, 443. *Bills*, IV.

EASEMENT.

I. What is.

Distinction between an easement and an occupation, 705. *Occupation*, I.

II. How acquired.

1. What water rights not to be acquired either by express grant or user, 287. *Canal*, I. 1.
2. Exclusion of certain periods, 568. *Way*.
3. Grant of licence, when to be exercised only once, 813. *Licence*.

III. Excess.

How far it effects the rights of the owner of the dominant tenement.

Plaintiff, being reversioner of a house which adjoined premises in the occupation of defendant and had ancient windows, rebuilt the house, added an upper story, opened windows in that story, and enlarged the ancient windows and otherwise altered their position: such rebuilding and alterations being within twenty years of the commencement of the action. Defendant subsequently rebuilt his premises, and thereby darkened the windows in both the upper and the lower stories of plaintiff's house.

Held, in an action by plaintiff, as reversioner, for this obstruction, that the plaintiff having, by his alterations, exceeded the limits of his right, and it being, through the nature of such alterations, impossible for the defendant, in the lawful exercise of his own rights, to obstruct such excess without at the same time obstructing the plaintiff's former right, the plaintiff must be considered as losing his former right, at all events until he restored his house to its original condition.

Sembler, that such alteration did not destroy the right altogether.

Held, further, that a defence founded upon the fact of such alteration by the plaintiff, and the impossibility of a partial obstruction, was properly raised under a traverse of plaintiff's right to the windows. *Renshaw v. Bean*, 112.

IV. Pleading and evidence.

1. Justification as to "a certain mill" where a new mill has been added to the old one, 287. *Canal*, I. 1.
2. New assignment when necessary, 287. *Canal*, I. 1.
3. Issue when divisible, 287. *Canal*, I. 1.
4. Defence founded on alteration by plaintiff: how available, 112. *Ante*, III.

V. Particular easements.

1. Ancient lights, 112. *Ante*, III.
2. See also *Way*, *Watercourse*.

EAST INDIA COMPANY.

Mandamus to pay military officer, when refused.

An officer commanding forces of her Majesty and of *The East India Company*, in India, has no such legal right, by statute or otherwise, to his pay, as entitles him (in the absence of any specific undertaking or acknowledgment) to a mandamus calling upon the Company to discharge arrears, though he has always received his pay from the Company, and their practice has been to discharge it monthly. *Ex parte Napier*, 692.

EJECTMENT.

Habero facias possessionem returnabile immediately.

The provision in stat. 3 & 4 W. 4. c. 67. s. 2., that "all writs of execution may be tested on the day which the same are issued, and be made returnable immediately after execution thereof," extends to writs of habere facias possessionem, the enacting words being plain, and neither the title of the Act nor the preambles of sects. 1, 2, affording sufficient ground for restricting the clause to actions merely personal. *Doe dem. Hudson v. Roe*, 806.

ELECTION.

- I. By holder of instrument in ambiguous form, 471. *Bills*, I.
- II. Of Councillor, 576. *Councillor*.
- III. By vestry meeting, 718. *Vestry*, I.

ENCROACHMENT.

On public highway, 870. *Highway*.

ENJOYMENT.

By which a right of way is acquired, 568. *Way*.

EQUIVOCAL INSTRUMENT.

Holder's option, 471. *Bills*, I.

ESTATE.

Remoteness, 224. *Devise*, III. 1.

EVIDENCE.

- I. Competency of witness. *Witness*.
- II. Documentary: letters.

Subsequent letters when not admissible to aid in construing contract, 503. *Agent*, II. 1.

III. Admission.

1. Explanation of mistake in fact, 71. *Bank*, I.
2. By repairing highway out of district, 761. *Statute*, III.

EXCESS.

In exercise of easement, 112. *Easement*, III.

EXECUTION.

- I. Writs of: teste and return.

What may be made returnable immediately, 806. *Ejectment*.

II. When void as against assignees.

From omission to file order, 516. *Bankrupt*, II.

EXECUTORS AND ADMINISTRATORS.

I. Contracts pending at the time of the death.

1. Entire contract for work completed by administrator under a new agreement.

A. declared as administrator of *B.*, stating that defendant, in *B.*'s lifetime, was indebted to *B.* in money to be paid by defendant to *B.* on request. It was proved that *B.* had contracted with defendant, in writing, to do certain works for him for 400*l.*, to be paid upon completion of the works: *B.* died before their completion; and *A.*, before he had taken out letters of administration, agreed with defendant to complete, and did complete, the works.

Held, that these facts did not support the declaration, inasmuch as, the contract being entire, and the works unfinished at *B.*'s death, no debt accrued from defendant to *B.* in *B.*'s lifetime; although the new agreement with *A.* amounted, as between him and defendant, to a rescinding of the original contract, which would entitle *A.*, as administrator, to sue on a quantum meruit in respect of the work done by *B.* *Crosthwaite v. Gardner*, 640.

2. Effect of rescinding after the death, 640. *Ante*, I.3. Promissory note in hands of testator and bequeathed as a specific legacy, 878. *Bills*, V. 1.

II. Set-off by.

What debts are mutual.

An executor sued, as such, for a debt which accrued to the plaintiff from the testator in his lifetime, may set off a debt for money had and received to defendant's use, as executor,

and money due on an account stated with him as executor, since the death of the testator; such debts being mutual, within stat. 2 G. 2. c. 22. s. 13. *Mardell v. Thelluson*, 857. Since overruled, see note (a).

III. Legacies.

Effect of forfeiture by felony of legatee, 878. *Bills*, V. 1.

IV. Pleading.

On cause of action not complete at the time of the death, 640. *Ante*, I. 1.

EXECUTORY DEVISE.

See *Devise*, III.

FALSE IMPRISONMENT.

See *Imprisonment*.

FELONY.

Forfeiture of legacy, 878. *Bills*, V. 1.

FEME COVERT.

See *Baron and Feme*.

FILING.

Of order staying proceedings on payment of debt and costs, 516. *Bankrupt*, II.

FINALITY.

Of Chancellor's decision on a memorial charging County Court Judge with misbehaviour, 175. *County Court*, I. 1.

FISHERIES.

I. Convention with France.

1. Remedy for injury occasioned by breach of regulations, 882. *Action*, I. 1.
2. Obligation to show lights, 882, 884. *Action*, I. 1.

II. Pleading.

Declaration for injury from noncompliance with regulations, 882. *Action*, I. 1.

FOREIGN LAW.

Scotch decisions when received as authority, 93. *Death*, I.

FORFEITURE.**I. For felony.**

1. Effect on legacies, 878. *Bills*, V. 1.
2. Executor when trustee for Crown, 878. *Bills*, V. 1.
- II. Of shares in joint stock company, 736. *Company*, I. 1.

FORMER RECOVERY.

Effect of former recovery for nominal damages considered, 252. *Account Stated*, I.

FRANCE.

Convention as to fisheries, 882. *Action*, I. 1.

FRIENDLY SOCIETY.

Decisions on enactments as applied to other societies, 277. *Building Society*, I.

GENERAL ISSUE.**I. Plea amounting to.**

Argumentative non assumpsit, 2. *Assurance*, I.

II. Not guilty. *Not guilty*.**GENERALITY.**

In pleading, 661. *Covenant*, I. 1.

GOODS.

Sale of. *Vendors and Purchasers*.

GRANT.

Implied.

Not where actual grant would be illegal, 287. *Canal*, I. 1.

HABEAS CORPUS.**Ad subjiciendum.**

On application of husband for custody of wife, 781. *Baron and Feme*, I.

HABERE FACIAS POSSESSIONEM.

Page 806. *Ejectment*.

HEARING.

What constitutes a complete hearing on a memorial charging county court judge with inability and misbehaviour, 178. *County Court*, I. 1.

HIGHWAY.**I. What is a highway.**

Over a place which is not a thoroughfare.

Trespass for entering plaintiff's close and pulling down a wall therein. Plea: That the close was a public pavement within the Metropolitan Pavement Act, 57 G. 3. c. xxix.; that plaintiff, unlawfully and contrary to the Act, erected thereon the said wall; and the wall incumbered the pavement, and because plaintiff refused, on defendant's request, to remove the same, defendant entered and pulled it down.

Held, on motion for judgment Non obstante veredicto, that the plea was bad for not shewing that it was absolutely necessary for defendant, in order to exercise the alleged right of passage, to remove the wall.

A public highway may, in law, exist over a place which is not a thoroughfare. Whether, in fact, it does exist, is a question for the jury. *Bateman v. Buck*, 870.

II. Points on highways dedicated but not repairable under Highway Act.**1. The dedicating landowner not liable to repair it.**

When a road has been dedicated to the public by a landowner, but the

conditions have not yet been fulfilled which make it repairable by the parish under stat. 5 & 6 W. 4. c. 50. s. 23., the landowner is not liable to repair it; and, consequently, he is not the "person having the management" of such road within the Railways Clauses Consolidation Act, 1845 (9 & 10 Vict. c. 20.), s. 57.: although, since the dedication, he has voluntarily done some repairs, made a sewer and drains, and granted permission to persons desiring to open communications with the sewers, or interfere with the road; and no one else has, in these respects or any other, managed or exercised controul over the road or sewers.

Such dedicator cannot, therefore, recover penalties, under sect. 57 of the Railways Clauses Act, against a Railway Company who have made a cut across such road, rendering it impassable, and have not in due time restored the communication.

Quare whether the Company could be indicted for the obstruction of such a way by severing and not restoring it. *Regina v. Wilson*, 348.

2. The dedicating landowner not the "person having the management," 348. *Ante*, 1.
3. The dedicating landowner cannot recover penalties from Railway Company for not restoring, 348. *Ante*, 1.
4. Liability of Railway Company in respect of, 348. *Ante*, 1.

III. Repair in towns under acts incorporating the Towns Improvement Clauses Act.

Joint liability of districts previously separate.

Before the passing of the Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 34., the borough of *A.* was divided into a town and a country district, each maintaining its own highways. That Act was incorporated in stat. 12 & 13 Vict. c. xxxv. (for the improvement of the borough of *A.*), except so far as any thing in the former Act was varied or otherwise provided for by this. By the latter

Act, sects. 20, 24, the mayor, aldermen and burgesses of *A.* were empowered to cause any street in the borough of *A.* to be sewered and paved, at the expense of the adjoining landowners, and certify the same, when completed, to be a public highway: and sect. 25 enacted that it should be lawful for them from time to time to make a rate for the maintenance of such highways upon the occupiers of all houses &c. and lands "within the said borough." Stat. 10 & 11 Vict. c. 34. s. 48. enacts that the Commissioners (that is the persons or body corporate entrusted to execute any local improvement Act incorporated with this) shall be the surveyors of all highways within the limits of such local Act, and shall have, within those limits, all the powers of surveyors; and that the inhabitants of the district within those limits shall not be liable to highway rate in respect of roads within other parts of the parish &c. in which the said district is situate. By sect. 49, the Commissioners are to be indictable for non-repair of any public highway within the limits of such local Act, in the same manner as the inhabitants thereof or of any parish &c. or other district therein were liable before the passing of such Act.

Held that the mayor, aldermen and burgesses of *A.* were bound, as Commissioners under the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34., to rate the whole borough for the repair of highways paved and certified under sects. 20, 24, of the local Act, and likewise to rate the whole for repair of the public highways not so paved and certified. And that a rate upon the country district alone, for repair of the highways within it (not paved or certified), was bad. *Slater v. Ashton under Lyne, Mayor, &c.*, 398.

IV. Liability to repair by statute.

Effect of repeal after indictment and before plea, 761. *Statute*, III.

V. Liability to repair highway out of the district.

1. As to the necessity for shewing consideration, 761. *Statute*, III.
2. Evidence, 761. *Statute*, III.

VI. Surveyors.

1. Mayor, aldermen &c. as commissioners under local act, 398. *Ante*, III.
2. Election: poll how to be taken, 718. *Vestry*, I. 1.

VII. Rates.

On what district, 398. *Ante*, III.

VIII. Removal of obstructions.

Not by private individual without necessity, 870. *Ante*, I.

IX. Evidence.

Effect of shewing continued repairs of road out of district, 761. *Statute*, III.

X. See also *Bridge*.

TURNPIKE ROADS.

XI. Letting of tolls.

1. Validity of contract by clerk.

Sect. 57 of stat. 3 G. 4. c. 126. provides that "all contracts and agreements to be made or entered into for the farming or letting the tolls of any turnpike roads, signed by the trustees" "letting such tolls," "or by their clerk or treasurer," shall be valid, "notwithstanding the same may not be by deed or under seal."

Held: 1. That an agreement for the letting of tolls, signed by the clerk to the trustees, and stating that by that agreement he, "on behalf of the trustees," did "agree to let," and the lessee did agree to take, the tolls and toll house for two years, was made according to sect. 57; the clerk having authority, by the statute, to contract, as well as to sign, on behalf of the trustees.

2. That stat. 8 & 9 Vict. c. 106. s. 3., which provides that "a lease, required by law to be in writing, of any tenements or hereditaments" shall be void at law unless made by deed,

IMPLICATION.

does not apply to agreements for the lease of tolls under stat. 3 G. 4. c. 126 *Shepherd v. Hodsmore*, 316.

2. Need not be by deed, 316. *Ante*, I.

XII. Trustees.

Contracts by, 316. *Ante*, XI. 1.

XIII. Clerk to the trustees.

Validity of contracts by, 316. *Ante*, XI. 1.

HUSBAND AND WIFE.

See *Baron and Feme*.

ILLEGALITY.

I. Contravention of public policy or statute.

Contract to apply funds of a railway company to unauthorized purposes, 618. *Contract*, I. 1.

II. Illegal consideration.

Buying off opposition in Insolvent Court, 443. *Bills*, IV.

III. Illegal grant not to be implied, 287. *Canal*, I. 1.

IV. Effect of devise comprising an illegal contingency, 224. *Devise*, III. 1.

IMPLICATION.

I. Necessary, 789. *Application*.

II. Of adjudication, when refused, 393. *Adjudication*.

III. Not of a grant which would be illegal, 287. *Canal*, I. 1.

IV. Of cesser of power of executing works on cesser of power of compensation, 531. *Compensation*, I.

V. Implied undertaking by agent that he has authority, 503. *Agent*, II. 1.

VI. From rescinding contract after part performance, 640. *Executors*, I. 1.

VII. From use and occupation, 632. *Corporation*, I. 1.

IMPRISONMENT.

I. On criminal charge on suspicion.

What facts warranting belief a defendant not being a peace officer must shew in his plea.

To a count in trespass for assaulting and falsely imprisoning plaintiff, and putting him in irons, defendant pleaded: That he was commander of one of the Queen's ships of war, at sea; that plaintiff, at the times when &c., was steward of the ship, and, as such, was servant to defendant on board the said ship, and had access to his cabin, and had the charge of his goods and chattels there; that on two occasions, just before the times when &c., moneys had been feloniously stolen from defendant's possession out of a desk then being in his said cabin; that upon each occasion the desk had been clandestinely opened by means of a key, and the plaintiff had access to and could have obtained the key of the said desk and unlocked the same and taken away the said moneys; and defendant then believed that no other person had or could have obtained access to the key of the said desk without plaintiff's knowledge; Wherefore defendant, having probable cause of suspicion, and suspecting the plaintiff for, among other things, the causes aforesaid, to have been guilty of the stealing, &c., did, as such commander, and as he lawfully might for the cause aforesaid, gently lay hands &c., and put plaintiff in irons, and so keep him (the same being a reasonable mode of detainer) for a reasonable time until defendant, as commander &c., could examine into the circumstances of suspicion against plaintiff according to law and for the purpose of reporting to the Lords of the Admiralty or bringing plaintiff to trial, if it appeared right to do so. Replication, *De Injurâ.*

After verdict for defendant on this plea,

Held, on motion for judgment non obstante veredicto,

That, in an action for false imprisonment on a criminal charge by a

person not being a peace officer, mere belief is not a sufficient justification, but facts must be shewn on which the belief was grounded, in order that the Court may judge whether or not the defendant had probable cause for arresting. That all the facts need not be set out, but only enough to shew ground of reasonable suspicion. That the facts alleged here were sufficient, at least after verdict; and, per Lord *Campbell C. J.*, they would have been so on demurrer.

And that, if the plaintiff meant to contend that the facts did not justify putting in irons as a mode of detainer, he should have new assigned. *Broughton v. Jackson*, 378.

II. New assignment.

When necessary, 378. *Ante*, I.

IMPROPRIATOR.

See *Title*.

INABILITY.

Removal of county court judge, 173. *County Court*, I. I.

INDICTMENT.

Certiorari and procedendo, 773. *Certiorari*, IV.

INFERENCE.

Necessary, 789. *Application*.

INFERIOR COURT.

Certiorari and procedendo, 773. *Certiorari*, IV.

INFORMATION.

Criminal. *Criminal Information*.

INITIAL.

Signature with initial of Christian name, 576. *Councillor*, I.

JUDGMENT.

JUDGMENT.

When void.

As against assignees of bankrupt, from omission to file order, 516. *Bankrupt*, II.

JUDICIAL PROCEEDING.

I. What is.

1. Order to discommune, when not, 647. *University*, I.

2. Proceeding on summons to answer or explain, when not, 647. *University*, I.

II. What not such as to be revised on certiorari.

The granting of a beer house licence, 687. *Beer*, I.

JURISDICTION.

I. Concurrent.

In borough and county, 361. *Poor*, XII.

II. Shewing on face of proceedings.

What need not be shewn by agents authorised to act as commissioners, 831. *Agent*, I. 1.

JURY.

Discharge by Judge, 777. *Costs*, II.

JUSTICE OF THE PEACE.

I. Interest.

1. Proceedings quashed on account of interference of interested justice, 416. *Certiorari*, I.

2. What is interference, 416. *Certiorari*, I.

3. Accidental presence does not vitiate, 421. *Appeal*, VI. 2.

II. Borough and county.

Concurrent jurisdiction : appeal, 361. *Poor*, XII.

LANDLORD AND TENANT. 931

III. Validity and effect of arrangements by.

1. When justices for a division may be regarded as a committee appointed by Quarter Sessions, 841, 851. *Bridge*, I. 1.

2. Conventional arrangements as to repair of bridges, 841. *Bridge*, I. 1.

IV. Limitation of proceedings before.

Retrospective effect of enactment, 343. *Construction*, II. 3.

V. Order of justices. *Order*, II. III.

LAND.

Occupation of, by waterpipes, 705. *Occupation*.

LANDLORD AND TENANT.

I. Relation how created.

1. Letting of turnpike tolls by agreement signed by clerk on behalf of the trustees, 316. *Highway*, XI. 1.

2. When by parol contract with a corporation, 632. *Corporation*, I. 1.

II. Yearly tenancy.

What reference to a year not sufficient to make the tenancy one for a year.

Premises were let from 19th April, 1841, at the yearly rent of 42*l.* payable quarterly, the first payment, of 7*l.* 13*s.* 6*d.*, to be made on the 24th June 1841, being the proportion down to that date; the tenant to hold and enjoy &c., at the said rent, until one of the said parties should give the other six calendar months' notice to quit: the tenant to leave the said premises in as good condition as at the date of the agreement.

Held, that notice might be given to quit at the expiration of any six months after June 24th; and that a notice on 24th June for 25th December, 1841, was good. *Doe dem. King v. Grafton*, 496.

III. Term.

Tenancy until either party shall give six months' notice to quit, 496. *Ante*, II.

IV. Notice to quit: the date with reference to which it is to be calculated.

Where at the commencement of the tenancy there was a fractional payment of rent to the end of the current quarter, 496. *Ante*, II.

V. Use and occupation.

By a corporation or its agent, 632. *Corporation*, I. 1.

VI. Repairs.

1. Covenant to repair runs with land though assignee not named, 661. *Covenant*, I. 1.
2. Covenant to yield up in repair runs with land though assignee not named, 661. *Covenant*, I. 1.
3. Effect of paying lessee a sum for dilapidations, 661. *Covenant*, I. 1.
4. Condition of lessor furnishing timber: readiness and willingness, 661. *Covenant*, I. 1.
5. What is a repairing or amending, 813. *Licence*, II.

VII. Cultivation.

Breach of covenant how assigned, 661. *Covenant*, I. 1.

LAW.

Articles in a convention that are to have the force of law, 882. *Action*, I. 1.

LEASE.

By what devise leaseholds pass as realty, 474. *Devise*, II. 1.

LEGACY.

Effect of forfeiture by felony of legatee, 878. *Bills*, V. 1.

LETTER.

Contract by: subsequent letters when not admissible, 503. *Agent*, II. 1.

LIBERTY.

See *Licence*.

LICENCE.

I. Public.

1. The granting when not revised on certiorari, 687. *Beer*, I.
2. Mode of contesting validity, 687. *Beer*, I.

II. Private: extent of grant: to do an act only once, or toties quoties.

Liberty to make and amend a goit.

Lands, partly adjoining a river, were demised for 999 years, by indenture, in which the lessor granted to the lessee liberty to cut a goit or sluice out of the said river, at a proper and convenient distance above a certain weir, in the most convenient line through certain closes (named) of the lessor, into a close intended for a mill dam, part of the demised lands; and from time to time and at any time to turn the water of the river through the said goit: And liberty, from time to time, and at all times during the term, to view, examine, carry and lay down materials, and repair and amend the said goit or sluice (and other works specified), when so made as aforesaid, or any of them, when and as often as need or occasion should be, making reasonable satisfaction to the lessor, his heirs and assigns, for all damage to be done or occasioned thereby to the grass or herbage of the lessor, &c.: And the lessee covenanted that he, his executors, &c., would make reasonable satisfaction to the lessor, his heirs and assigns, for all damages to be occasioned to the lands of the lessor by the lessee, his executors, &c., in exercise of any of the liberties, privileges and powers by the indenture granted, except for the term of two years next ensuing the

commencement of the rent, during which time no trespass or damage should be charged or paid for.

In an action of trespass against the lessee for widening a goit on the lessor's soil to the extent of nine additional feet, the defendant pleaded that the goit was made, *viz.* on &c. (a day named), in due exercise of the liberty above mentioned, but that, the same not having been made of a sufficient width, and having been completed to a small and insufficient width only, *viz.* nine feet, so that, without widening it as after mentioned, defendant could not enjoy the demised tenement as she was entitled by the indenture to do, he, on &c., in further due exercise &c., cut down the sides of the goit and widened it: justifying the alleged trespasses.

Replication: that, before the expiration of two years &c., and before the times when &c., *viz.* on &c., the lessee, in due exercise of the liberty &c., made and completed a goit, being the goit in the plea mentioned, of the width therein mentioned; and the same remained and was used by the lessee continually from the last mentioned day until defendant, under colour of the indenture, committed the alleged trespasses.

Held by the Court of Queen's Bench, on demurrer to the replication, that the privilege given to defendant by the deed was to make a goit once only, and that, after having completed a goit, he could not justify entering plaintiff's land again and widening the goit from nine feet to eighteen: For that the power to make a goit was exhausted, and the widening was not a repairing or amending within the meaning of the deed. Judgment for plaintiff.

Judgment of Queen's Bench affirmed in Exchequer Chamber. *Bostock v. Sidebottom*, 813.

LIGHT.

I. Ancient lights.

Alteration in dominant tenement, 112.
Easement, III.

II. Shewing lights.

As required by fishery regulations in convention with *France*, 882.
Action, I. 1.

LIMITATION.

I. Of actions and legal proceedings.

1. Quo warranto: what a disqualification arising de die in diem, 526. *Councillor*, II.
2. Retrospective operation of enactment, 343. *Construction*, II. 3.
3. What expression of hope not an acknowledgment, 134. *Acknowledgment*, II.
4. On successive breaches of condition of surety bond, 593. *Bond*, 1.

5. Pleading: enrolment on the record: new assignment when not necessary, 593. *Bond*, I.

II. Of actions: effect of payment of interest.

By wife after marriage on note made by her before marriage, 262. *Bills*, II.

III. Of estate.

1. Remoteness: age of twenty three years, 224. *Devise*, III. 1.
2. Contingent limitations, 197, 224. *Devise*, I. 1. III. 1.

LIMITED LIABILITY.

Page 2. *Assurance*, I.

LOAN SOCIETY.

When it need not be registered as a joint stock company, 271. *Company*, II. 1.

LOCALITY.

See *Place*.

LOSS.

By whom to be sustained.

By banker or customer on deposit of bank notes subsequently dishonoured, 722. *Bank*, I.

LUNATIC.

Pauper. *Poor*, XIII. XIV.

MANAGER.

Of an estate.

Apportionment of salary, 425. *Apportionment*.

MANDAMUS.

I. When it lies, generally.

Where there is a legal obligation and no remedy by action, 692. *East India Company*.

II. In particular instances.

1. To tithe commissioners to hear and determine differences, 156. *Tithe*, I. 2.

2. To justices to determine complaint against railway company for not restoring highway interfered with, 348. *Highway*, II. 1.

3. To appoint new commissioners, 531, 549. *Compensation*, I.

4. Not to *East India Company* to enforce payment of pay of military officer, 692. *East India Company*.

III. Return.

By tithe commissioners with respect to differences alleged to hinder the making of an award, 156. *Tithe*, I. 2.

MARRIAGE.

I. Consequences of the relation, 262. *Bills*, II.

II. See also *Baron and Feme*.

MASTER AND SERVANT.

I. Generally.

1. Covenants for employment and service as auditor of an estate, 425. *Apportionment*.

2. Pension on dismissal with resignation with, adequate compensation to be determined by a referee then of shewing adequate cause determined, 425. *Apportionment*.

II. Liability of master for a servant.

Notwithstanding the absence of formal authority under seal of servant of a corporation, 73. *Company*, I. 1.

MAXIMS.

I. Quodlibet accessorium sequitur tam sui principalis, 271. *Corporation*, II. 1.

II. Omnia presumuntur ritè esse. 393. *Adjudication*. 632. *Corporation*, I. 1.

III. Verba relata inesse videntur. 742. *Company*, I. 1.

IV. Nova constitutio futuris non imponere debet, non præteriti Statute, III.

MEMORANDA.

Pages 1, 890.

MISBEHAVIOUR.

Removal of county court judge. *County Court*, I. 1.

MISFEASANCE.

Compensation for death occasioned by misfeasance, 93. *Death*, I.

MISTAKE.

I. In fact.

Admission of receipt of money. *Bank*, I.

II. Clerical error. *Regina v. Wu*. 393.

MONEY.

Specific money, 277. *Building Society*.

MONEY HAD AND RECEIVED.

Money paid under void execution, 516.
Bankrupt, II.

MOTION.

Renewed, 789. *Application*.

MUNICIPAL CORPORATION.

I. Councillor.

1. Disqualifying interest, 526. *Councillor*, II.
2. Quo warranto against, time of applying for, 526. *Councillor*, II.
3. When he may be relator, 526. *Councillor*, II.
4. Election : burgesses' signature, 576. *Councillor*, I.
5. Election : description in voting paper of the voter's place of rating, 576. *Councillor*, I.

II. Contracts : corporate seal.

Disqualification by invalid contract, 526. *Councillor*, II.

III. Borough Sessions.

Appellate jurisdiction : pauper lunatics, 361. *Poor*, XII.

IV. When surveyors of highways.

As commissioners of improvement under local act, 398. *Highway*, III.

NAME.

Signature with initial for the Christian name, 576. *Councillor*, I.

NECESSITY.

- I. Necessary consequence of obstructing an encroachment, 112. *Easement*, III.
- II. As an ingredient in the right of a private individual to remove an encroachment on the public, 870. *Highway*, I.

NEW ASSIGNMENT.

- I. In action for false imprisonment, 378. *Imprisonment*, I.
- II. After justification in respect of a mill part of which is a recent addition, 287. *Canal*, I. 1.
- III. When not necessary on plea of statute of limitations, 593, 604. *Bond*, I.

NISI PRIUS.

See *Trial*.

NON ASSUMPSIT.

Argumentative, 2. *Assurance*, I.

NOT GUILTY.

Defences available under this plea.

In case for obstruction of lights, 112. *Easement*, III.

NOTE.

Promissory Bills of Exchange and Promissory Notes.

NOTICE.

I. Acts valid without.

1. Forfeiture of shares for non-execution of deed of settlement, 736. *Company*, I. 1.
2. Issuing procedendo, 773. *Certiorari*, IV.

II. Sent by post.

At what time deemed to have been given, 388. *Poor*, X.

III. Of intention to apply for certiorari, 416. *Certiorari*, I.IV. To quit. *Landlord and Tenant*, IV.

NUISANCE.

Public.

Abatement by private individual, 870. *Highway*, I.

OBLIGATION.

See *Bond*.

OBSTRUCTION.

I. Of easement exercised in excess, 112. *Easement*, III.II. Of highway, 870. *Highway*, I.

OCCUPATION.

I. Of land: for purposes of rating.

Occupation by water pipes.

Paving Commissioners, appointed under a local Act, 11 G. 3. c. 12., were empowered, by sect. 36, to make rates upon all persons who "shall inhabit, hold, occupy, possess or enjoy any land, house, shop, warehouse, cellar, vault or other tenements or hereditaments within any of the said streets, squares" &c. of a certain district; such rate not to exceed 1s. 2d. in the pound of the yearly rents or value of such of the said lands, houses &c., situate in any of the said streets, squares &c., the greater part of which should be paved in a certain manner, and not to exceed 9d. or 6d. in the pound, respectively, for such of the said lands, houses &c., situate &c., the greater part of which should be paved in a certain other manner, or only repaired under the Act. Different assessments were provided for public buildings, dead walls, and vacant ground adjoining the said streets, squares &c., and for unoccupied houses. No specific assessment was provided for water pipes laid down in the district. The Commissioners, in whom the paving materials of the said streets, squares &c. were expressly vested by the Act, were empowered to alter the position of the pipes belonging to any water or gas company, underneath such streets, squares &c.

Held, that an incorporated water Company, whose mains, pipes and other apparatus were laid down within the district, were liable, under sect. 36, to be rated as occupiers of land. *Reg. v. East London Waterworks*, 705.

PARTNERSHIP.

II. By corporation or its agent, 632. *Corporation*, I. 1.

OFFICE.

Salary.

Of what employment not apportionable, 425. *Apportionment*.

OFFICER.

I. Disqualification.

By interest in contract, 526. *Councillor*, II.

II. Excuses for.

Vis major, 277. *Building Society*, I.III. Military: remedy for pay withheld by East India Company, 692. *East India Company*.

OFFICIAL ASSIGNEE.

See page 503. *Agent*, II. 1.

ORDER.

I. Judge's order. *Judge*.

II. Of justices: formal parts.

Adjudication of truth of complaint, 393. *Adjudication*.

III. Of justices: clerical error.

What mistake so treated. *Reg. v. Williams*, 393.

IV. Of Vice Chancellor of University.

Order discommuning a tradesman, 647. *University*, I.

PARTICULARITY.

I. In pleading probable cause, 37. *Imprisonment*, I.II. In notices and inquisitions as to land required, 831. *Agent*, I. 1.

PARTNERSHIP.

Liability of managing partners.

I.	Limitation to funds available in their hands, 2. <i>Assurance</i> , I.	PERFORMANCE.
2.	Liability of one of several directors on a contract not executed by him, 2. <i>Assurance</i> , I.	I. Part performance. Of contract afterwards rescinded, 640. <i>Executors</i> , I. 1.
II.	Liability of shareholders. Limitations to the amount of their shares respectively in subscribed capital, 2. <i>Assurance</i> , I.	II. Readiness and willingness. When sufficient, 661. <i>Covenant</i> , I. 1.
III.	Powers. Effect of a contract ultra vires, 2. <i>Assurance</i> , I.	PLACE.
IV.	Incorporated companies. See <i>Company</i> .	Where cause of action arises, 785. <i>County Court</i> , II.
V.	Joint Stock Companies. See <i>Company</i> .	PLEA.
VI.	Insurance Companies. See <i>Assurance</i> .	I. Generally. Distinction between a bar and a suspension until proof under Winding-up Acts, 862. <i>Railway</i> , I. 1.

PARTY.

- I. Commission to examine on his own behalf, 470. *Witness*, I. 1.
II. Examined as witness in his own behalf.
Costs, 588. *Costs*, I.

PAUPER LUNATIC.

See *Poor*, XIII. XIV.

PAVEMENT.

See *Highway*.

PAY.

Of military officer, 692. *East India Company*.

PAYMENT.

- I. By whom.
1. By wife, effect of, 262. *Bills*, II.
2. By previous indorser, 757. *Bills*, VII.
II. Plea of.
Payment *puis darrein continuance* by prior indorser, 757. *Bills*, VII.
- 3 R
10. Buying off opposition in the Insolvent Court, 443. *Bills*, IV.
11. Non provision of timber for repairs, 661. *Covenant*, I. 1.

12. That plaintiff had not executed deed of settlement, 728. *Company*, III. 1.
13. Payment pendente lite by prior indorser, 757. *Bills*, VII.
14. Justification of trespass under a licence to make, repair and amend a goit, 813. *Licence*.
15. Wall pulled down because it was built on a public highway, 870. *Highway*, I.

PLEADING.

I. Burthen of pleading.

1. Burthen of shewing compliance with condition precedent applicable to both parties, 425. *Apportionment*.
2. Shewing breach of or compliance with statutory duty, 882, 884. *Action*, I. 1.

II. Particularity.

1. In pleading probable cause, 378. *Imprisonment*, I.
2. In breach of covenant to cultivate according to custom of country, 661. *Covenant*, I. 1.

III. Certainty.

As to the terms of insurance declared on, 2. *Assurance*, I.

IV. Argumentativeness.

Argumentative non assumpsit, 2. *Assurance*, I.

V. Duplicity.

In plea that note was given to buy off opposition in Insolvent court, 443. *Bills*, IV.

VI. Condition precedent.

Readiness and willingness, when sufficient, 661. *Covenant*, I. 1.

POLICY.

See *Assurance*. *Public policy*.

POOR.

POLL.

At vestry meeting, 718. *Vestry*, I.

POOR.

I. Poor rate: rateable value of property extending into several parishes.

Where one toll entitles to use of whole, acreage principle.

The Hull Dock Company were proprietors of several docks, made at different times and under successive Acts of parliament. The docks communicated with each other and with river *Humber*, and extended into several parishes. Every vessel paid a single toll, which became due on entry into the docks and was paid then, on clearance outwards; and she was entitled by such payment to go into any one or more of the docks at the will of her own master, or under direction of the Company's harbour master, who had certain powers regulating the position of vessels. The payments, at whatever dock received, were carried to one general account.

Held that the poor rate upon much of the docks as lay in any parish must be assessed, not according to the actual receipts in that parish, but to the proportion which the area of the docks within that parish bore to the entire area of the docks. For that, such a case, an assessment on the acreage principle was unavoidable; though an assessment on the basis of earnings within the parish is preferable where the nature of the case permits *Regina v. Hull Dock Company*, 325.

II. Poor rate: rateable occupation.

Waterpipes, 705. *Occupation*, I.

III. Union, liabilities of.

For expense of pauper lunatics, 55. *Post*, XIV.

IV. Overseers, collateral duties.

Granting certificates to applicants for beerhouse licences, 687. *Beer*, I.

V. Overseers' expenditure: contested appeals.

1. As to acting with or without authority of vestry.

The overseers of a parish, at a vestry meeting held for the purpose, assessed a railway Company at 2,708*l.* The Company gave notice of appeal. At a subsequent vestry it was decided that the assessment should be reduced to 2000*l.*, and that, if the Company refused that compromise, the overseers should take such proceedings as they might be advised were necessary. The Company appealed: and the then overseers, without calling a vestry meeting, contested the appeal. The Sessions reduced the rate to 300*l.*, subject to a case for the Queen's Bench. The case was not sent up, the overseers having arranged with the Company that the rate should be fixed at 450*l.* The Poor Law Auditor disallowed the expenses of contesting the appeal, on two grounds: 1., That the overseers should have called a vestry meeting to determine whether the appeal should be contested; 2., That they should, after the decision at Sessions, have summoned a vestry to determine whether the case for the Queen's Bench should be proceeded on. The expenses in question were, after the audit, sanctioned by the inhabitants at a vestry meeting.

Held, that the overseers were not bound to summon a vestry meeting before contesting the appeal or abandoning the case reserved; and that, as the auditor did not allege that what they had done was inexpedient or that they had acted *mala fide*, the grounds of disallowance were bad. *Regina v. Street*, 682.

2. Auditor's disallowance, when quashed, 682. *Ante*, 1.

VI. Auditor.

His disallowance when quashed, 682. *Ante*, V. 1.

VII. Settlement by renting a tenement.

1. Occupation and payment of rent in cases of joint tenancy.

A separate and distinct dwelling house and land in the parish of *H.* were let to *William A.* and *Thomas A.*, as joint tenants, the rent and value of the land taken separately, being sufficient to confer a settlement on both. The farm was occupied by *William*, *Thomas* residing on another farm at a distance. *Thomas* paid the whole rent of the farm. The overseers of *H.* had always demanded and received payment of the rates in respect of the house and farm in question from *Thomas*: and, in the rate books of *H.*, "Atkinson, Mr." appeared as the name of the occupier of the farm in two rates, and "Atkinson, Thomas" in a third.

Held, that the Sessions were justified in finding, First, that there was a sufficient occupation and payment of rent by *William*, and a sufficient assessment of him and payment of the rates by him, to give him a settlement in *H.* under stats. 1 *W.* 4. c. 18. and 4 & 5 *W.* 4. c. 76.; and, Secondly, that he had been sufficiently charged with, and paid his share of, the public taxes of *H.* to gain a settlement under stat. 3 & 4 *W. & M.* c. 11. *Regina v. Husthwaite*, 447.

2. Assessment and payment of rates in cases of joint tenancy, 447. *Ante*, VII.

VIII. Settlement by parochial taxation.

Evidence of charge and payment in cases of joint tenancy, 447. *Ante*, VII, 1.

IX. Notice of appeal, sending by post.

Notice at what time deemed to have been given.

Under stat. 11 & 12 *Vict.* c. 31. s. 9., which provides that a period of fourteen days after "the sending" a copy of the depositions on which an order of removal is made, shall be allowed for "the giving" notice of appeal, such notice, if sent by post under stat. 14 & 15 *Vict.* c. 105. s. 10., is to be considered as given on the day on which, by the ordinary course of post, it ought to have reached the party to whom it

is sent, though in fact it arrive by the post on a later day. *Regina v. Slau-stone*, 388.

X. Trial of appeal.

Interference of interested justice and the consequences, 416. *Certiorari*, I.

XI. Case reserved.

Abandonment without consent of vestry, 682. *Ante*, V. 1.

XII. Lunatic pauper, appeal against order of maintenance.

To sessions of what jurisdiction.

Where an order is made by two county justices under stat. 8 & 9 Vict. c. 126. s. 62., for the maintenance of a lunatic pauper removed to the county asylum from a borough within the county, having a separate court of Quarter Sessions, the appeal against such order lies exclusively to the borough Quarter Sessions. *Regina v. Lancashire Justices*, 361.

XIII. Lunatic pauper, whether union or county liable to expenses.

Irishman irremovable by five years' residence.

Under stat. 12 & 13 Vict. c. 103. s. 5., if a pauper lunatic, born in *Ireland* and having no *English* settlement, is removed to an asylum after five years' residence in a parish in *England* from which, if sane, he would have been irremovable by stat. 9 & 10 Vict. c. 66., the union, not the county, is liable to the expenses of his removal and maintenance. *Regina v. Arnold*, 553.

POST.

Notice sent by.

At what time deemed to have been given, 388. *Poor*, IX.

POWER.

I. Generally.

1. When exhausted, 813. *Licence*.

PRIVILEGE.

2. When act of parliament authorises execution by agent, 831. *Agent* I. 1.

3. Contract ultra vires, 457. *Compensation*, II. 1. 618. *Contract*, I.

II. Continuance.

Of power to execute works after power to make compensation has become extinct, 531. *Compensation*, I.

PRACTICE.

See *Amendment*. *Appeal*. *Application*. *Arbitration*. *Attorney*. *Certiorari*. *Costs*. *Counsel*. *Criminal Information*. *Damages*. *Discretionary Ejectment*. *Execution*. *Inquest*. *Judge*. *Judgment*. *Mandamus*. *Ne Assignment*. *Order*. *Recognizance*. *Regula Generales*. *Rule*. *Session Staying Proceedings*. *Summons*. *True Verdict*. *Warrant of Attorney*. *Witness*. *Writ*.

PREAMBLE.

Of statute, 806. *Ejectionment*.

PRESCRIPTION.

I. By twenty years user, 287. *Case* I. 1.

II. See also. *Way*.

PRESUMPTION.

I. *Omnia rite esse acta*, 173. *Court* I. 1.

II. From occupation by corporation or its agent, 632. *Corporation*, I. 1.

PRINCIPAL.

I. Principal and agent. *Agent*.

II. Principal and surety. *Surety*.

PRIVILEGE.

See *Power*.

PROBABLE CAUSE.

For arrest on criminal charge.

Pleading, 378. *Imprisonment*, I.

PROCEDENDO.

Page 773. *Certiorari*, IV.

PROHIBITION.

When it does not lie.

To restrain proceeding to discommune, 647. *University*, I.

PROMISE.

I. Capacity to promise.

Wife during coverture with respect to cause of action before coverture, 262. *Bills*, II.

II. See also *Contract*.

PROMISSORY NOTE.

See *Bills of Exchange and Promissory Notes*.

PROMOTIONS.

Pages 1, 890.

PROOF.

In bankruptcy.

Against surety, 593. *Bond*, I.

PUBLIC HOUSE.

See *Beer*.

PUBLIC POLICY.

Contract in contravention of, 618. *Contract*, I. 1.

QUARTER SESSIONS.

See *Sessions*.

QUO WARRANTO.

I. Time of applying for.

Where there is a disqualification arising de die in diem, 526. *Councillor*, II.

II. Against county court judge, when refused, 173. *County Court*, I. 1.

RAILWAY.

I. Dissolution and winding-up of Company.

I. Retrospective application of winding-up acts.

The Joint Stock Companies Winding-up Amendment Act, 1849 (12 & 13 Vict. c. 108.), excepts, by sect. 1, from the application of The Joint Stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45.), railway companies incorporated by Act of Parliament. The Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83.), s. 30., enacts that notwithstanding such provision, the two first mentioned Acts shall apply to any such incorporated railway company in respect of which an order for winding it up may have been made before the passing of The Joint Stock Companies Winding-up Amendment Act, 1849, and that the proceedings for winding-up the same shall proceed and be carried on under the Winding-up Acts of 1848 and 1849, or either of them. Per Lord Campbell C. J. Stat. 13 & 14 Vict. c. 83. is retrospective, and renders valid proceedings taken, before the passing of this Act, for the dissolution of a railway company incorporated by statute.

The omission by a creditor of a railway company to prove his debt before the Master, under The Joint Stock Companies Winding-up Act, 1848, sect. 73, cannot be pleaded in bar to an action against the Company by such creditor. The proper mode of stopping the action is to apply, under that section, for a Judge's order to stay proceedings until proof be made.

Mckenzie v. The Sligo and Shannon Railway Company, 862.

2. Remedy where creditor omits to prove under the acts and sues the company, 862. *Ante*, 1.

II. Liabilities with respect to highways.

With respect to highways dedicated but not repairable by parish, the conditions of stat. 5 & 6 W. 4. c. 50. s. 23. not having been complied with, 348. *Highway*, II. 1.

III. Compensation to landowner.

Covenants with respect to before passing of act : entry on lands : ultra vires doctrine, 457. *Compensation*, II. 1.

IV. Misappropriation of funds.

Absolute covenant to pay compensation to landowner without reference to entering his lands or not, 457. *Compensation*, II. 1.

V. Contracts in contravention of public policy or statute.

Contract to insure the applicants for a bill against loss by rejection, 618. *Contract*, I. 1.

VI. See also *Company*.

RATE.

I. County rate. *County*.

II. Poor rate. *Poor*.

III. Highway rate, 398. *Highway*, III.

RATIFICATION.

Nonratification by one of several principals, 503. *Agent*, II. 1.

READINESS.

Readiness and willingness when sufficient, 661. *Covenant*, I. 1.

RECEIPT.

Effect of mistake in fact, 722. *Bank*, I.

RECOGNIZANCE.

I. To appear and answer indictment *Reg. Gen.* 251.

II. Costs secured by, 703. *Criminal Information*.

REGULÆ GENERALES.

E. T. 15 Vict. Form of recognizance to secure personal appearance of defendant on trial of indictment, 251.

REMEDY.

I. Special.

1. Effect of its being extinguished 531. *Compensation*, I.

2. Cumulative, 862. *Railway*, I. 1.

3. When exclusive and not merely cumulative, 882. *Action*, I. 1.

II. In particular instances.

1. Where creditor of railway company sues instead of proving under *Winding-up Acts*, 862. *Railway*, I. 1.

2. On improper granting of a beer house licence, 687. *Beer*, I.

3. Quo warranto against successor, to try validity of dismissal of relator 173. *County Court*, I. 1.

REMOTENESS.

Executory devise void for, 224. *Devise* III. 1.

RENT CHARGE.

Tithe commutation rent charge, 393. *Adjudication*.

REPAIR.

I. Covenants with respect to, 661. *Covenant*, I. 1.

REPEAL.

II. What is a repairing or amending under a power to repair and amend, 813. *Licence*.

REPEAL.

Of statute. *Statute*, III.

REPRESENTATION.

Distinction between a warranty and a mere representation, 560. *Contract*, XIII. 1.

REPUGNANCY.

Of proviso in a contract, 2, 78. *Assurance*, I.

RESCINDING.

Of contracts, 640. *Executors*, I. 1.

RETROSPECTIVE OPERATION.

Of enactment limiting time of proceeding, 343. *Construction*, II. 3.

RETURN.

Of writ of execution, 806. *Ejectment*.

REVENUE.

See *Stamp*.

REVOCATION.

Of devise, 197. *Devise*, I. 1.

RIGHT.

Traverse of.

What defences available under, 112. *Easement*, III.

ROAD.

See *Highway*.

SENTENCE.

943

ROBBERY.

Loss by, when excused, 277. *Building Society*, I.

RULE.

I. General rules. *Regulae Generales*.

II. Side bar rule, 703. *Criminal Information*.

III. Of Joint Stock Company, notice, 736. *Company*, I. 1.

SALE.

See *Vendors and Purchasers*.

SATISFACTION.

Plea of.

When it must shew satisfaction of damages and costs, 757. *Bills*, VII.

SCOTLAND.

Scotch decisions when received as authority, 93. *Death*, I.

SEAL.

I. Liability for acts done without seal.

For a refusal by a joint stock company, 736. *Company*, I. 1.

II. When not necessary to contract by corporation, 632. *Corporation*, I. 1.

SECOND APPLICATION.

See *Application*.

SENTENCE.

Addition requiring certificates of good behaviour, 751. *Church Discipline*, I.

SERVANT.

See *Master and Servant*.

SERVITUDE.

See *Easement*.

SESSIONS.

I. Quarter Sessions : borough or county.

Appeal against order of maintenance of pauper lunatic, 361. *Poor*, XII.

II. Constitution of Court.

Presence and interference of interested justice, 416. *Certiorari*, I. 421 n. *Appeal*, VI. 2.

III. Conventional arrangements by, 841. *Bridge*, I. 1.IV. Certiorari and procedendo, 773. *Certiorari*, IV.

SET OFF.

What are mutual debts.

In the case of an executor, 857. *Executors*, II.

SETTLEMENT.

Deed of, 728, 736. *Company*, I. 1. III. 1.

SHAREHOLDER.

I. In registered joint stock company, 728, 736. *Company*, I. 1. III. 1.

II. Liability of, 2. *Assurance*, I.

SIDE BAR RULE.

For taxation of costs in criminal cases, 703. *Criminal Information*.

SIGNATURE.

I. Initial of Christian name, 576. *Cillor*, I.

II. Of notice of motion for certior 416. *Certiorari*, I.

SOCIETY.

I. Generally.

What does not require registration a joint stock company, 271. *Company*, II. 1.

II. Particular societies.

1. Loan society, 271. *Company*, II
2. Building societies. *Building ciety*.

STAMP.

Exemption of contracts relating to goods.

Though in consideration of transfer a debt, 321. *Contract*, V.

STATUTE.

FIRST: Generally.

I. Title of Act.

When it has not a restricting eff 806. *Ejectment*.

II. Preamble.

When it has not a restricting eff 806. *Ejectment*.

III. Repeal.

Effect on pending prosecutions.

By Act of parliament, the liability to repair certain highways in a parish was taken from the parish and cast upon certain townships in which the highways respectively were; and

Act gave a form of indictment against such townships for non-repair, which would have been insufficient at common law. One of the townships was indicted under the Act, but, before trial, the Act was repealed without any reference to depending prosecutions. The Court arrested a judgment given against the township on such indictment.

Quere whether, on indictment against inhabitants of a district, charging them with liability to repair a highway out of the district, it is necessary to prove a specific consideration for such liability; or whether consideration is to be inferred from the fact of repair, without other evidence. *Regina v. Devon, Inhabitants*, 761.

IV. Statutory powers.

Grant or user inconsistent with, 287. *Canal*, I. 1.

V. Interpretation clauses.

Meanings not excluded by the context or by the nature of the subject matter, 728. *Company*, III. 1.

VI. Retrospective enactments.

1. Effect upon proceedings already taken, 862. *Railway*, I. 1.
2. Retrospective operation of limitation clauses, 343. *Construction*, II. 3.

VII. Clause postponing the act's coming into operation.

Effect in preventing injustice, 343. *Construction*, II. 3.

VIII. Contract in contravention of statute.

Contract to apply funds of a statutory company to an unauthorized purpose, 618. *Contract*, I. 1.

IX. Articles in a convention that are to have the force of law.

Convention with *France* as to fisheries, 882. *Action*, I. 1.

X. Covenants conditional on the passing of a bill, 457. *Compensation*, II. 1.

XI. Construction of statutes. *Construction*, II.

SECONDLY : Decisions on general acts.

XII. 6 H. 8. c. 6. (Certiorari), 773. *Certiorari*, IV.

XIII. 21 Jac. 1. c. 17. (Limitations).

1. Sect. 3. Acknowledgment, 134. *Acknowledgment*, II.

2. Sect. 3. Payment of interest by wife, 262. *Bills*, II.

XIV. 3 & 4 W. & M. c. 11. (Poor).

Sect. 6. Charge and payment of rates, 447. *Poor*, VII.

XV. 4 & 5 W. & M. c. 18. (Criminal Law).

Sect. 2. Costs to defendant, 703. *Criminal Information*.

XVI. 1 G. 1. stat. 2. c. 24. (*Kennet and Avon Navigation*). 531. *Compensation*, I.

XVII. 2 G. 2. c. 22. (Set off).

Sect. 13. Mutual debts, 857. *Executors*, II.

XVIII. 11 G. 2. c. 12. (*Paving Goodman's Fields*). 705. *Occupation*, I.

XIX. 13 G. 2. c. 18. (Certiorari).

Sect. 5. Notice of application, 416. *Certiorari*, I.

XX. 33 G. 3. c. 52. (*East India Company*).

Sect. 128. Pay of military officer, 692, 696. *East India Company*.

XXI. 34 G. 3. c. 78. (*Rochdale Canal*).

Sect. 113. User of water by mill owners, 287. *Canal*, I. 1.

- XXII. 35 G. 3. c. 63. (Stamps).**
- Sect. 11. Insurer's name, 2. *Assurance*, I.
- XXIII. 43 G. 3. c. 59. (Bridges).**
- Sect. 5. What not to be a county bridge, 841. *Bridge*, I. 1.
- XXIV. 53 G. 3. c. 155. (East India Company).**
- Sect. 55. Military charges, 692, 696. *East India Company*.
- XXV. 55 G. 3. c. 184. (Stamps).**
- Sched. Part I. Sale of goods, 321. *Contract*, V.
- XXVI. 58 G. 3. c. 69. (Sturges Bourne's Act).**
- Sect. 3. Mode of voting, 718. *Vestry*, I. 1.
- XXVII. 3 G. 4. c. 126. (Turnpike roads).**
- Sect. 57. Letting of tolls, 316. *Highway*, XI. 1.
- XXVIII. 4 G. 4. c. 81. (East India Company).**
- Sects. 43, 44. Military pay, 692, 697. *East India Company*.
- XXIX. 5 G. 4. c. 114. (Insurance).**
- Insurer's name, 2. *Assurance*, I.
- XXX. 6 G. 4. c. 16. (Bankrupt).**
- Sect. 64. Proof on surety bonds, 593. *Bond*, I.
- XXXI. 10 G. 4. c. 56. (Friendly Societies).**
- Sects. 20, 22. Money due from treasurer, 277. *Building Society*, I.
- XXXII. 1 W. 4. c. 18. (Poor).**
- Sect. 1. Occupation and payment of rent, 447. *Poor*, VII.
- XXXIII. 1 W. 4. c. 22. (Witnesses).**
- Sect. 4. Commission to examine, 490. *Witness*, I. 1.
- XXXIV. 2 & 3 W. 4. c. 71. (Prescription).**
- Sects. 7, 8. Exclusion of term exceeding three years, 568. *Way*.
- XXXV. 3 & 4 W. 4. c. 42. (Amendment of the law).**
- Sect. 3. Limitation in actions of bonds, 593. *Bond*, I.
- XXXVI. 3 & 4 W. 4. c. 67. (Uniformity of process).**
- Sect. 2. Teste and return of writs of execution, 806. *Ejectment*.
- XXXVII. 3 & 4 W. 4. c. 85. (East India Company).**
- Sect. 79. Salary of commander-in-chief, 692, 697. *East India Company*.
- XXXVIII. 4 & 5 W. 4. c. 22. (Appportionment).**
- Sect. 2. Apportionment of salary of officer, 425. *Apportionment*.
- XXXIX. 4 & 5 W. 4. c. 76. (Poor).**
- Sect. 66. Assessment and payment of rates, 447. *Poor*, VII.
- XL. 4 & 5 W. 4. c. 85. (Sale of Beer).**
- Sect. 21. Overseers' certificates, 687. *Beer*, I.
- XLI. 5 & 6 W. 4. c. 50. (Highways).**
- Sect. 23. Conditions before parish becomes liable to repair, 348. *Highway*, II. 1.
- XLII. 5 & 6 W. 4. c. 76. (Municipal Corporations).**
1. Sect. 28. Disqualifying interest 526. *Councillor*, II.
 2. Sect. 32. Signature of and description in voting paper, 576. *Councillor*, I.
- XLIII. 6 & 7 W. 4. c. 32. (Building Societies).**
- Sect. 4. Money due from treasurer 277. *Building Society*, I.

XLIV. 6 & 7 W. 4. c. 71. (Tithe commutation).	Sects. 1, 11, 14. Remedy for breaches, 882. <i>Action</i> , I. 1.
Sects. 45, 50. Power to determine suits, 145, 156. <i>Tithe</i> , I.	LV. 7 & 8 Vict. c. 110. (Joint Stock Companies).
XLV. 7 W. 4 & 1 Vict. c. 26. (Wills).	1. Sect. 2. What not a purpose of profit, 271. <i>Company</i> , II. 1.
1. Sect. 3. Disposal of personal estate, 878. <i>Bills</i> , V. 1.	2. Sects. 3, 26, 51. Shareholders, 728, 736. <i>Company</i> , I. 1. III. 1.
2. Sect. 26. When leaseholds pass as realty, 474. <i>Devise</i> , II. 1.	LVI. 8 & 9 Vict. c. 16. (Companies Clauses).
XLVI. 7 W. 4 & 1 Vict. c. 47. (<i>East India Company</i>).	Sect. 97. Contract by parol, 632. <i>Corporation</i> , I. 1.
Sects. 1, 3. Pay of officers, 692, 698. <i>East India Company</i> .	LVII. 8 & 9 Vict. c. 106. (Leases).
XLVII. 7 W. 4 & 1 Vict. c. 78. (Municipal Corporations).	Sect. 3. Letting of turnpike tolls, 316. <i>Highway</i> , XI. 1.
Sect. 23. Time of applying for quo warranto, 526. <i>Councillor</i> , II.	LVIII. 8 & 9 Vict. c. 126. (Pauper lunatics).
XLVIII. 1 & 2 Vict. c. 45. (Common Law Judges).	Sect. 62. Appeal to sessions of what jurisdiction, 361. <i>Poor</i> , XIII.
Sect. 1. Judge at Chambers, 773. <i>Certiorari</i> , IV.	LIX. 9 & 10 Vict. c. 20. (Railways Clauses).
XLIX. 1 & 2 Vict. c. 110. (Debtor and Creditor).	Sect. 57. Penalties for not restoring highway, 348. <i>Highway</i> , II. 1.
Sect. 9. Attestation of warrant of attorney, 789. <i>Application</i> .	LX. 9 & 10 Vict. c. 66. (Removal of poor).
L. 3 & 4 Vict. c. 37. (<i>East India Company</i>).	Sect. 1. Irish lunatic, 553. <i>Poor</i> , XIV.
Sect. 35. Pay of commander in chief, 692, 698. (<i>East India Company</i>).	LXI. 9 & 10 Vict. c. 93. (Death by accident).
LI. 3 & 4 Vict. c. 61. (Sale of Beer).	Sects. 1, 2. Measure of damages. 93. <i>Death</i> , I.
Sects. 1, 2. Overseers' certificates, 687. <i>Beer</i> , I.	LXII. 9 & 10 Vict. c. 95. (County Court).
LII. 3 & 4 Vict. c. 86. (Church Discipline).	1. Sect. 18. Removal of judge for inability and misbehaviour, 173. <i>County Court</i> , I. 1.
Sect. 6. What may be included in sentence, 751. <i>Church Discipline</i> , I.	2. Sect. 60. Where cause of action arises, and when complete, 785. <i>County Court</i> , II.
LIII. 5 & 6 Vict. c. 54. (Tithe).	LXIII. 10 & 11 Vict. c. 34. (Towns Improvement Clauses).
Sect. 16. Order for contribution, 393. <i>Adjudication</i> .	Sects. 48, 49. Rate for what district, 398. <i>Highway</i> , III.
LIV. 6 & 7 Vict. c. 79. (Convention with France as to fisheries).	

LXIV. 11 & 12 Vict. c. 31. (Poor).

Sect. 9. Notice of appeal, 388. *Poor, IX.*

LXV. 11 & 12 Vict. c. 43. (Justices out of Sessions).

Sect. 11. Limitation of proceedings, 343. *Construction, II. 3.*

LXVI. 11 & 12 Vict. c. 45. (Winding up Act 1848).

Sect. 72. Creditor omitting to prove his debt, 862. *Railway, I. 1.*

LXVII. 12 & 13 Vict. c. 103. (Pauper lunatics).

Sect. 5. Liability of union, 553. *Poor, XIII.*

LXVIII. 12 & 13 Vict. c. 106. (Bankrupts).

Sect. 137. Filing Judge's order, 516. *Bankrupt, II.*

LXIX. 12 & 13 Vict. c. 108. (Winding up amendment Act 1849).

Sect. 1. Exemption of Railway Companies, 862. *Railway, I. 1.*

LXX. 13 & 14 Vict. c. 61. (County Court).

Sect. 13. Costs of action in superior Court, 257. *Appeal, I.*

LXXI. 13 & 14 Vict. c. 83. (Abandonment of railway Act 1850).

Sect. 30. Application of winding up Acts, 862. *Railway, I. 1.*

LXXII. 14 & 15 Vict. c. 99. (Evidence).

Sect. 2. Competency of wife, 367. *Baron and Feme, II.*

LXXIII. 14 & 15 Vict. c. 99. (Evidence).

Sect. 2. Expenses of party witness, 588. *Costs, I.*

LXXIV. 14 & 15 Vict. c. 105. (Poor).

Sect. 10. Notice by post, 388. *Poor, X.*

THIRDLY : Decisions on Acts local personal, public.

LXXV. Chronological arrangement

1. 53 G. 3. c. xcii. (*Ile of Wight Bridge, I. 1.*)

2. 6 & 7 Vict. c. lxxvi. (*Bar drainage, 831. Agent, I. 1.*)

3. 57 G. 3. c. xxix. (*Metropol Paving Act, 870. Highway, I.*)

4. 6 & 7 W. 4. c. lxxv. (*South Ea Railway, 618. Contract, I. 1.*)

5. 12 & 13 Vict. c. xxxv. (*Act under Lyne Improvement, Highway, III.*)

LXXVI. Alphabetical arrangement

1. *Ashton under Lyne Improvement, 398. Highway, III.*

2. *Bardney, Tupholme and Stix drainage, 831. Agent, I. 1.*

3. *Goodman's Fields Paving, Occupation, I.*

4. *Hull Docks, 325. Poor, I.*

5. *Kennet and Avon navigation, Compensation, I.*

6. *Metropolitan Paving Act, Highway, I.*

7. *Rochdale Canal, 287. Canal,*

8. *South Eastern Railway, 618. tract, I. 1.*

9. *Wight, Isle of, highways, Bridge, I. 1.*

LXXVII. Drainage acts.

Bardney Tupholme and Stixwold, Agent, I. 1.

LXXVIII. Highways and Improvement of towns.

1. *Ashton under Lyne, 398. Highway, III.*

2. *Goodman's Fields, 705. Occupation, I.*

3. *Metropolitan Paving, 870. Highway, I.*

4. Isle of Wight, 841. *Bridge*, I. 1.

LXXIX. Navigation and docks.

1. *Hull Docks*, 325. *Poor*, I.

2. *Kennet and Avon*, 531. *Compensation*, I.

3. *Rochdale Canal*, 287. *Canal*, I. 1.

LXXX. Railway acts.

South Eastern, 618. *Contract*, I. 1.

STAYING PROCEEDINGS.

I. Until proof is made under Winding-up Acts, 862. *Railway*, I. 1.

II. Order for, on payment of debts and costs.

Necessity for filing, 516. *Bankrupt*, II.

STEWARD.

Of ship.

Plea of probable cause for apprehending him on charge of theft, 378. *Imprisonment*, I.

SUBSCRIBER.

To registered Joint Stock Company, 728, 736. *Company*, I. 1. III. 1.

SUMMONS.

I. Validity of proceedings without previous summons.

Procedendo, 773. *Certiorari*, IV.

II. When it amounts to a mere notice, 647. *University*, I.

III. Dismissal of, 257. *Appeal*, I.

SURETY.

I. Who is.

What joint obligor is a surety, 593. *Bond*, I.

II. Surety bond.

Successive breaches: statute of limitations; bankruptcy, 593. *Bond*, II.

SURVEYOR.

Of highways. *Highway*, VI.

SUSPENSION.

I. Of clergyman.

Of beneficed clergyman: requiring certificates of good behaviour, 751. *Church Discipline*, I.

II. Of action.

How enforced, 862. *Railway*, I. 1.

TAXATION.

Of costs. *Costs*.

TENANT.

See *Landlord and Tenant*.

TESTE.

Of writ of execution, 806. *Ejectment*.

TIME.

I. For making applications to the Court.

By way of appeal from Judge at Chambers, 257. *Appeal*, I.

II. Remoteness, 224. *Devise*, III. 1.

TITHE.

I. Powers of commissioners to determine pending suits.

1. Not between rival claimants of tithes.

The Tithe Commissioners have no power, under stat. 6 & 7 W. 4. c. 71. ss. 45., 50., to determine a suit pending between two rival claimants of tithes; inasmuch as the words "touching the right to any tithes, in sect. 45, refer only to suits which raise questions as to the titheability of particular lands, not to those which bring into question the right of particular parties to tithes of which the existence

is admitted: And, further, because a suit raising only a question of title between two claimants of tithes is not a "difference" whereby the making of the award by the Commissioner is "hindered," with the meaning of sect. 45. *Shepherd v. Londonderry, Marquis*, 145.

2. What questions between impro priator and vicar do not hinder the making of an award.

Mandamus, directed to the Tithe Commissioners, alleged that they had proceeded to effect a commutation of the tithes of the parish of H.; and that, during the proceedings, certain differences, whereby the making of their award was hindered, arose between landowners in the parish and the vicar, viz., whether certain old inclosed lands were exempt from the render of great tithes in kind, and of tithes of wool and lamb in kind, or, if not so exempt, whether they were subject only to the payment of 1s. per acre yearly, in lieu of the said tithes, to the impro priator; and whether certain new inclosed lands were wholly exempt from the render of great tithes in kind, and of tithes of wool and lamb in kind. The writ commanded the Commissioners to hear and determine the said differences.

Return: That at a former meeting of the Commissioners, for the purpose of awarding the amount of rent charge payable by a township of the said parish, the vicar claimed the tithes of lamb and wool, the im proprie te rector protesting against such claim, and the landowners contending that by an agreement, confirmed by a decree in Chancery in 1699, all the tithes of the parish had been com muted. That at a subsequent meet ing, the Commissioners having given notice that it would be held for the hearing and determining certain dif ferences whereby the making of their award was alleged to be hindered, the vicar proposed that his title to the tithes of wool and lamb should be tried by a feigned issue, the Com missioners first awarding the amount of rent charge to be paid in lieu of them to the party entitled; that the land-

owners insisted that the tithes of and wool had been extinguished by agreement and by decree in Chan cery and that a difference existed be tween the landowners, vicar and im proprie te concerning the said tithes; and called upon the Commissioners to determine the question. That it then arranged that, if the pa rty would not consent to try as above landowners might apply for a man dus to the Commissioners to try question whether the said tithes belonged to the vicar or to the landowners as im proprie tors of the ti tles of their respective lands. The re also stated that the said ques tion raised at the last mentioned mee ting was one of title. It then set o ut a bill in Chancery, filed in 1812 by the vicar against certain landowners for subtraction of tithes, in which question was raised whether the landowners of the parish were ever liable to tithes of lamb and wool to the vicar and also a decree in the said suit in 1817 (by which it appeared that defendants therein contended that an agreement, confirmed by decree in Chancery in 1699, part of certain closed lands was allotted to the vicar in lieu of all tithes arising to him from the said lands, and by a further agreement, in 1707, the landowners agreed to pay the vicar 1½d. per acre in lieu of all small tithes throughout the parish), which decree of 1817 ordered the master to take account of tithes of wool and lamb, as due to the vicar, dismissing his bill as to tithes of hay. The return then sets out a bill in Chancery, filed in 1819, by the im proprie te rectors against the vicar, claiming the tithes of wool and lamb, which bill was dismissed with costs. It then stated perception of the tithes by the vicar; and that Commissioners, considering that said decrees established the right of the vicar to tithes of lamb and wool, declined to comply with a requisition of the landowners, calling on them to confirm the agreements of 1699 and 1707, under stat. 5 & 6 Vict. c. 54, and refused to decide the question of title. That, in 1845, the said landowners obtained a mandamus to com

firm the agreements and decide the differences pending, and that, on return made, and demurrer, judgment was given for the Commissioners. That the assistant Commissioner, in 1850, made his award, which, after a fortnight's notice to the landowners, to give them an opportunity of advancing any further claim, was confirmed; and which awarded that all titheable lands in the parish were subject to payment of all tithes in kind, that certain persons therein named were proprietors respectively of the great tithes in the parish, and that the vicar for the time being was in possession of the tithes of wool and lamb, and entitled to the residue of the tithes; and awarded certain rent charges, in lieu of tithes, to the proprietors, and to the vicar "or to the party lawfully entitled," in lieu of tithes of wool and lamb, and of the said residue of tithes.

Held, on demurrer to this return, that, upon the whole record, the question raised was purely a question of title between the proprietor and the vicar, and that no difference existed between the landowners and the vicar which hindered the making of the award and which the Commissioners were therefore bound to hear and determine.

Quære, whether the writ was not bad, as raising, on the face of it, a question of title. *Regina v. Tithe Commissioners*, 156.

3. Questions of title, 156. *Ante*, 2.

II. Justices' order for payment of contribution.

When bad for not shewing adjudication, 393. *Adjudication*.

TITLE.

I. Of Act of Parliament, 806. *Ejectment*.

II. Question of title to tithes, 156. *Tithe*, I. 2.

TOLLS.

Demise : by what instrument.

Letting of turnpike tolls, 316. *Highway*, XI. 1.

TOWNS IMPROVEMENT CLAUSES ACT.

See *Statute*, LXIII.

TRANSFER.

Of debt, 321. *Contract*, V.

TRAVERSE.

Argumentative traverse, 2. *Assurance*, I.

TREASURER.

His obligation when that only of a bailee, 277. *Building Society*, I.

TRIAL.

Discharge of jury.

1. Costs of first trial, 777. *Costs*, II.
2. Effect of consent of counsel, 777. *Costs*, II.

TURNPIKE.

See *Highway*, XL.—XIII.

UNDERTAKING.

By agent, 503. *Agent*, II. 1.

UNION.

See *Poor*, III.

UNIVERSITY.

I. Powers of governing body with respect to tradesmen dealing with persons in *statu pupillari*.

The governing body of a University may lawfully issue a decree that every tradesman with whom a person in *statu pupillari* within the University contracts a debt exceeding 5*l.* shall make the same known to the tutor of such person's college, on pain of being

discommuned if he omits doing so : and, in case of disobedience, they may enforce such decree by ordering that no person in *statu pupillari* shall deal with the tradesman for a given period.

If the Vice Chancellor, attended, on summons, by the Heads of Colleges, makes an order to discommune, in pursuance of such decree, this is not a judicial proceeding which the Superior Courts can restrain by prohibition.

It makes no difference, as to these points, that the decree contains other distinct regulations which it requires licensed victuallers to comply with on pain of being deprived of their licenses.

The proceeding for the purpose of discommuning does not become judicial by the Vice Chancellor, through his officer, giving notice to the party complained of that the meeting will be held at a given time and place, and summoning him, or giving him liberty to attend, for the purpose of answering the complaint or offering explanation : nor is the party entitled, on that account, to demand admittance for his attorney. *Ex parte Death*, 647.

II. Discommuning.

1. Proceedings when not judicial, 647. *Ante*, I.
2. Admittance of attorney to the proceeding, 647. *Ante*, I.
3. Prohibition when refused, 647. *Ante*, I.

USE AND OCCUPATION.

- I. By corporation, 632. *Corporation*, I. 1.
- II. By company authorized to contract by parol, 632. *Corporation*, I. 1.

USER.

I. Rights claimed by.

- I. A right cannot be acquired by user against a party who could not legally grant it, 287. *Canal*, I. 1.

2. User of water from canal for purposes not authorized by stat 287. *Canal*, I. 1.

3. Exclusion of periods of tenanc 568. *Way*.

II. Pleading.

1. Divisibility of issue, 287. *Ca* I. 1.
2. New assignment when necessa 287. *Canal*. I. 1.

VALUE.

Rateable.

- Acreage principle, 325. *Poor*, I.

VENDORS AND PURCHASER

Sales of goods.

1. Exemption from stamp duti 321. *Contract*, V.
2. Warranties, 560. *Contract*, XI 1.
3. Effect of invoices, 560, 566. *C* tract, XIII. 1.

VERDICT.

- I. Entering distributively, 287. *Ca* I. 1.

II. Defects cured by.

- Defective particularity in plea of probable cause, 378. *Imprisonment*.

VESTRY.

I. Mode of voting.

1. Poll of persons present when co clusive.
- At a vestry, held under stat. 58 3. c. 69., for the purpose of electi surveyors of highways, of which pub notice had been given, it was agre that the vote should be taken by

shew of hands, leaving it open to any one to propose that the votes should be taken according to the statute. *A.* and *B.* were respectively proposed and seconded for the office of surveyor; and, on a shew of hands, *A.* had a majority. It was then proposed and seconded, on behalf of *B.*, that the votes should be taken according to the statute. No objection was made; and, on the votes being so taken, *B.* had a majority, and was declared duly elected. *A.* then demanded a poll of the whole parish.

Held that, the meeting having agreed to a poll being taken according to the statute, no one was entitled afterwards to demand a poll of the whole parish; that the election of *B.* was valid; and that a mandamus for another meeting to elect would not lie. *Regina v. Hillingdon*, 718.

2. Poll of whole parish when to be demanded, 718. *Ante*, 1.

II. Sanction of vestry to law proceedings, 682. *Poor*, V. 1.

VICAR.

See *Tithe*.

VICE CHANCELLOR.

Of University, 647. *University*, I.

VIS MAJOR.

Loss of money by, 277. *Building Society*, I.

VOTING PAPER.

Signature, and description of place of rating, 576. *Councillor*, I.

WAIVER.

Of former breaches of condition, 593. *Bond*, I.

WARRANT OF ATTORNEY.

Attestation.

1. What not a sufficient compliance with stat. 1 & 2 Vict. c. 110. s. 9., 789. *Application*.

2. What not a necessary inference, 789. *Application*.

WARRANTY.

What words of description or reference amount to a warranty, 560. *Contract*, XIII. 1.

WATER.

In a canal: what rights cannot be acquired either by grant or user, 287. *Canal*, I. 1.

WATERCOURSE.

I. Grant of licence to cut, repair, and amend a goit; when exhausted, 813. *Licence*.

II. What is a repairing or amending, 813. *Licence*.

WATERWORKS.

Occupation of land by waterpipes, 705. *Occupation*, I.

WAY.

Computation of period of enjoyment.

Term exceeding three years: when not excluded.

Under stat. 2 & 3 W. 4. c. 71. ss. 7., 8., the time during which the servient tenement has been under lease for a term exceeding three years is to be excluded from the computation of a forty years' enjoyment, but not from the computation of an enjoyment for twenty years. *Palk v. Skinner*, 568.

WIFE.

See *Baron and Feme*.

WILL.

I. Of personality: disposing power.

Right to sue on chose in action, to whom it passes, 878. *Bills*, V. 1.

II. Alteration by codicil.

How far it operates, 197. *Devise*, I. 1.

WINDING UP ACTS.

Application to railway company, 862. *Railway*, I. 1.

WINDOW.

See *Easement*.

WITNESS.

I. Commission to examine.

1. To examine parties: discretion of Court.

A commission may be granted, under stat. 1 W. 4. c. 22. s. 4., to examine a party to a suit, resident abroad, on his own behalf. But the Court may, in its discretion, refuse such commission, if sufficient ground be not shewn for requiring it.

And this Court refused a commis-

sion, where the only specific grant assigned was that the parties resident, and one carrying on business, in distant places abroad (*horn* and *Constantinople*), and they made the application bona *Castelli v. Groom*, 490.

2. What must be shewn on application for commission to examine persons on their own behalf, 490. *An*

II. Examination of parties.

What expenses allowed in tax 588. *Costs*, 1.

III. Competency.

Of wife of party to record, *Baron and Feme*, II.

WORK.

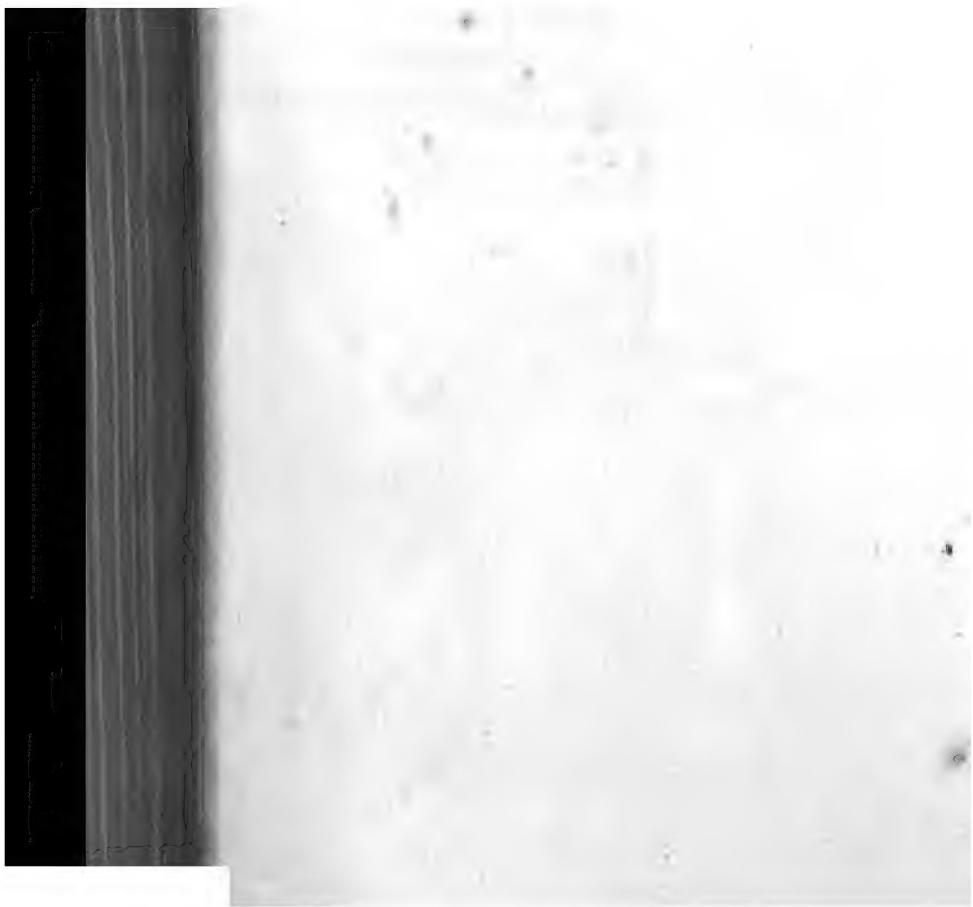
Done by intestate under entire contract not completed at his death *Executors*, I.

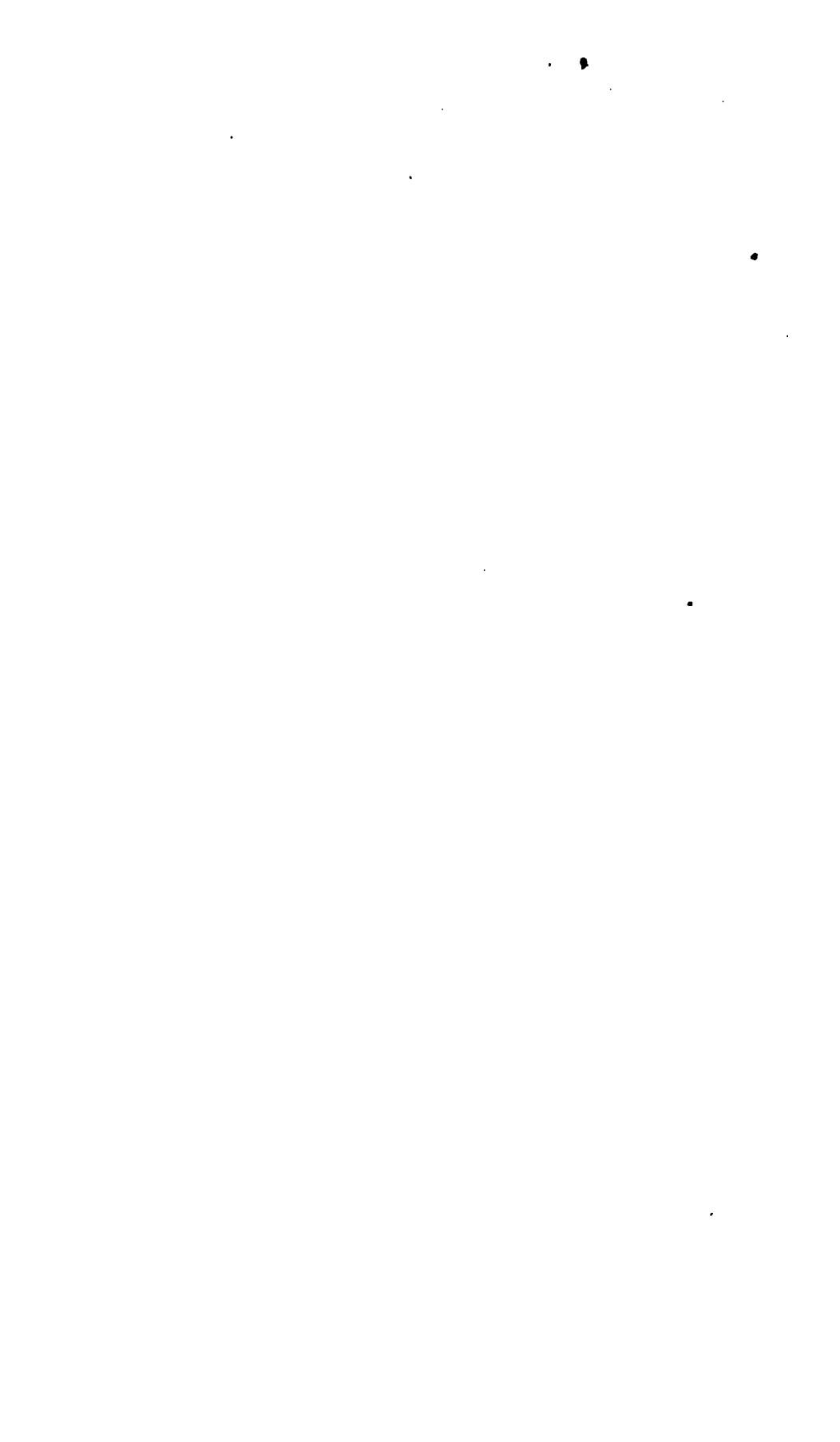
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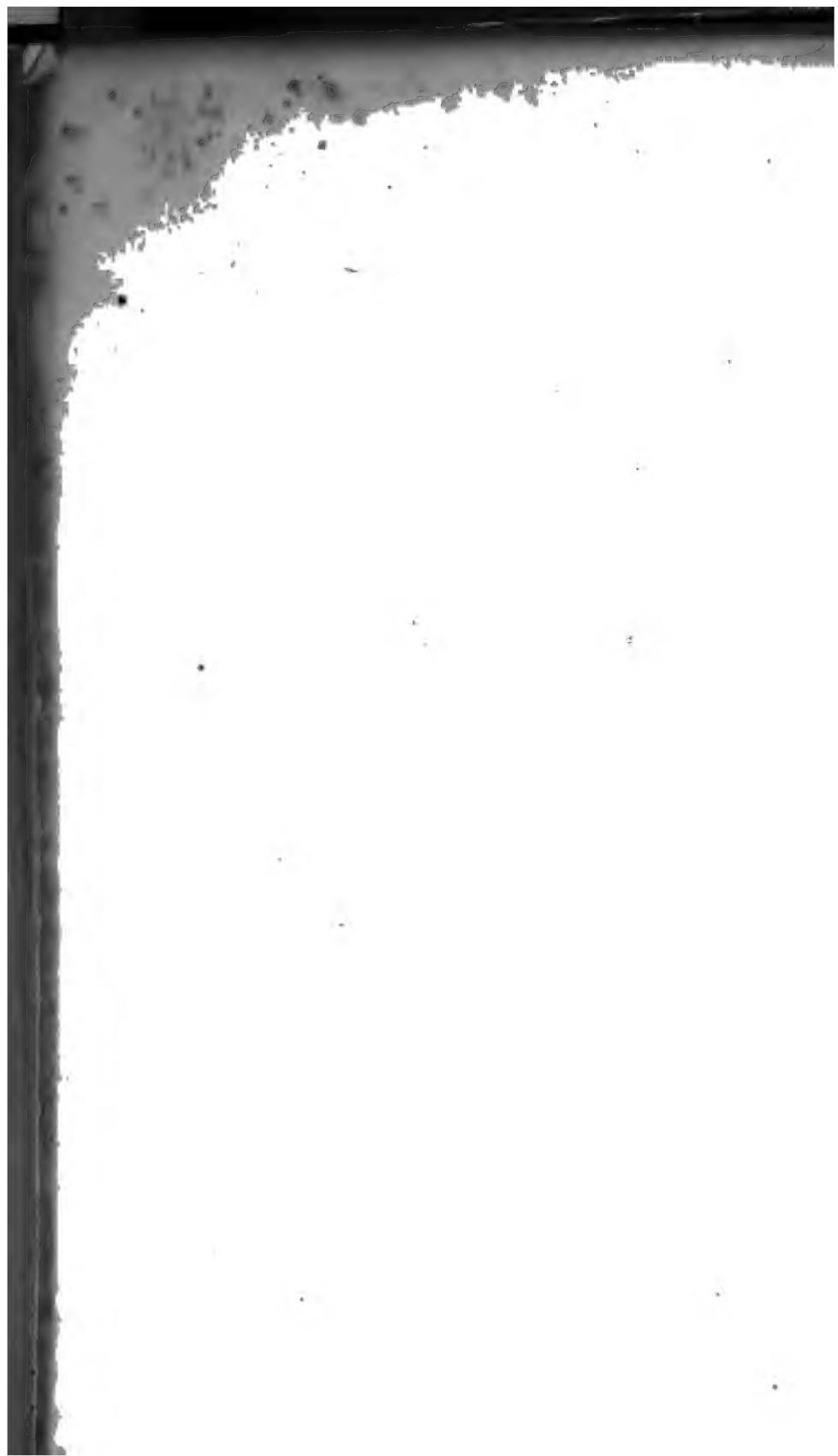
Habere facias possessionem, 806. *ment*.

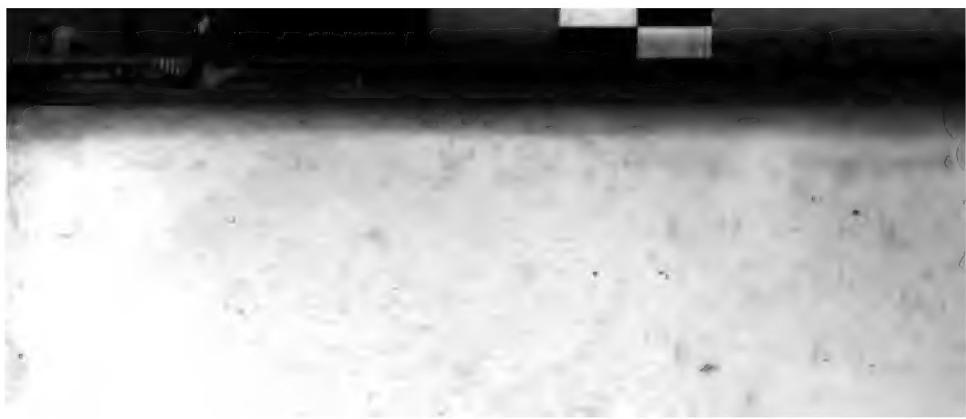
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